93-248

No. ____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SHARON JOHNSON,
Petitioner,

v.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 16, 1993

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QUESTIONS PRESENTED

1. In order to establish a claim of constructive discharge under the federal statutes prohibiting discrimination in employment, is it necessary for a plaintiff to prove not only that a reasonable person in the plaintiff's position would have regarded the working conditions as intolerable, but also that the employer acted with a "deliberate intent" to force the plaintiff to quit?

2. Is direct evidence of a deliberate intent to force an employee to resign required in order to prove a claim of constructive discharge under the Rehabilitation Act of 1973, 28 U.S.C. § 701 *et seq.*, whenever a federal employer makes some partial effort to accommodate the employee's disability?

LIST OF PARTIES

The parties in these consolidated appeals were Dr. Sharon Johnson, appellant in Nos. 92-1815 and 92-1846, and Donna Shalala, Secretary of the Department of Health and Human Services, appellant in Nos. 92-1109 and 92-1816.[1/]

[1/] The Washington, D.C. Council of Lawyers participated as an *amicus curiae*, in Nos. 92-1815 and 92-1846, regarding certain attorneys' fees issues that were rendered moot by the Fourth Circuit's disposition of the case.

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v.

DONNA SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, reported at 991 F.2d 126, is reprinted in Appendix A at pp. 1a-11a. The panel's order denying rehearing is reprinted in Appendix B at pp. 12a-14a. The district court's unpublished opinion and order entering judgment in favor of petitioner are reprinted respectively in Appendix C at pp. 15a-42a and Appendix D at pp. 43a-44a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was released on April 20, 1993. On May 4, 1993, petitioner filed a petition for rehearing and suggestion for rehearing en banc, which was denied on May 17, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves the proper interpretation of 29 U.S.C. §§ 791, 794, which are reproduced in Appendix E, at pp. 45a-50a.

STATEMENT OF THE CASE

Beginning in August 1985, petitioner, Dr. Sharon Johnson, sought from her employer, the National Institutes of Health (the "NIH"), modifications in her daily work schedule to accommodate her disabilities. After repeatedly failing to obtain any significant accommodation of her disabilities during the course of an entire year, petitioner resigned her employment under protest on August 20, 1986. Pet. App. 3a-7a, 18a-28a. Petitioner thereafter brought this suit, claiming that she had been "constructively discharged" from her position at NIH.

Following a bench trial, the district court found that NIH violated 29 U.S.C. § 701 *et seq.* by failing reasonably to accommodate petitioner's disabilities. Pet. App. 36a-38a. The district court also found that Dr. Johnson was subjected to intolerable working conditions that eventually forced her to terminate her employment. Pet. App. 37a-38a. Consistent with the Fourth Circuit's precedent, the district court then analyzed whether NIH acted with "deliberate intent" to cause petitioner to resign her employment, and found that such intent existed, based on its subsidiary factual findings that: (1) NIH had suggested that Dr. Johnson consider disability

retirement in its response to her initial request for accommodations, (2) her NIH supervisor prepared a false performance evaluation to support a determination of eligibility for disability retirement, and (3) NIH took no significant steps to accommodate Dr. Johnson's disabilities. Pet. App. 37a-38a.

The NIH noted a timely appeal to the U.S. Court of Appeals for the Fourth Circuit, seeking review only of the finding that the NIH had deliberately intended to cause Dr. Johnson's resignation. Pet App. 8a. Accordingly, the NIH declined to seek review of the findings that Dr. Johnson's disabilities were not reasonably accommodated or that the repeated failure to accommodate her disabilities created intolerable working conditions. *See id.*

On appeal, the Fourth Circuit accepted the district court's subsidiary findings, but held as a matter of law that NIH's partial (but inadequate) efforts to accommodate petitioner's disabilities precluded a finding of "deliberate intent" to force Dr. Johnson to resign. "The evidence here is insufficient to show a deliberate intent to discharge an employee when there has been an attempt to accommodate that same employee, even though the accommodation falls short of [what is required by] the Rehabilitation Act." Pet. App. 10a.

The Fourth Circuit expressed the fear that the district court's approach "threatens to convert every failure to accommodate under the Rehabilitation Act into a potential claim for constructive discharge." Pet. App. 9a. Thus, the Court of Appeals held that to prevail on a constructive discharge theory, an employee with a disability whose employer has offered partial or ineffective accommodations must present direct evidence that the employer deliberately intended to force the employee to resign. Pet. App. 11a.

REASONS TO GRANT THE PETITION

1. This Case Presents An Important Question of Federal Law On Which The Circuit Courts Have Reached Inconsistent Results

There is a sharp split among the circuits as to the proper standard for establishing a constructive discharge in employment discrimination cases.[1/] Three distinct and inconsistent approaches have been followed by various circuits.

Most courts of appeals do not require a plaintiff to show that the employer harbored a "deliberate intent" to force the employee to resign in order to establish a constructive discharge.[2/] In these circuits, "[t]he focus is upon the rea-

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[1/] A "constructive discharge" occurs when an employee as a practical matter is forced to resign. The application of the constructive discharge doctrine generally does not vary depending on the employment statute that is at issue; the same rules apply for establishing a constructive discharge regardless of the particular statute at issue. *Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1079 n.5 (3rd Cir. 1992) ("the doctrine of constructive discharge is the same in all employee discrimination claims"); *see also Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3rd Cir. 1984) (explaining that federal courts borrowed the constructive discharge doctrine from labor law and listing cases that apply the constructive discharge doctrine across various civil rights statutes).

[2/] *Hopkins* v. *Price Waterhouse*, 825 F.2d 458, 472 (D.C. Cir. 1987) ("a number of cases . . . have rejected the notion that the employer must have the specific intent of forcing the employee to quit"), *rev'd on other grounds*, 490 U.S. 228 (1989); *Watson* v. *Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) ("plaintiff need not show that the employer subjectively intended to force the employee to resign"); *Derr* v. *Gulf Oil Corp.*, 796 F.2d 340, 343-44 (10th Cir. 1986) ("an employer's subjective intent is irrelevant"); *Goss* v. *Exxon Office Sys., Inc.*, 747 F.2d at 887-88 ("[w]e hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine"); *Pittman* v. *Hattiesburg Mun. Separate School Dist.*, 644 F.2d 1071, 1077 (5th Cir. 1981) ("[t]he employee . . . does not have to prove it was the employer's purpose to force the employee to resign"); *see Aviles-Martinez* v. *Monroig*, 963 F.2d 2, 6 (1st Cir. 1992) (holding that a plaintiff must demonstrate that her working conditions in (continued...)

sonable reaction of the employee [to her working conditions]; it is not necessary to show that the employer subjectively intended to force a resignation." *Junior* v. *Texaco, Inc.*, 688 F.2d 377, 379 (5th Cir. 1982). Thus, the finder of fact is under no obligation "to divine the state of mind of the employer." *Bourque* v. *Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980). Under this standard, the employee need show only that he or she was faced with working conditions under which "a reasonable person in the employee's position and circumstances would have felt compelled to resign." *Pittman*, 644 F.2d at 1077.

Taking a markedly different approach, at least two other courts of appeals, including the court below, require a plaintiff to show that the employer possessed a "deliberate intent" to force the employee to resign in order to establish a constructive discharge. In these circuits, if the employee fails to show that the employer possessed a "deliberate intent" to force the employee to resign, no constructive discharge claim can be sustained.[3/]

[2/](...continued)
continued employment "would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign," without requiring any showing regarding the employer's subjective intent); *Greenberg* v. *Hilton Int'l Co.*, 870 F.2d 926, 936 (2d Cir. 1989) (same); *Buckley* v. *Hospital Corp. of America, Inc.*, 758 F.2d 1525, 1530-31 (11th Cir. 1985) (same); *see also Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 423-24 (7th Cir. 1989) ("[w]e agree with the district court's decision to adopt a test which focuses upon the impact of [the employer's] actions upon a reasonable person"); *cf. Daniels* v. *Essex Group, Inc.*, 937 F.2d 1264, 1272 (7th Cir. 1991) (holding that liability for a constructive discharge exists when an employer "knew or had reason to know about the existence of intolerable working conditions" and "fails to take appropriate remedial action").

[3/] *See Holsey* v. *Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).

The Sixth Circuit has opted for still another approach, under which a plaintiff must show both that the working conditions were intolerable and that there was some "aggravating factor." *See Yates* v. *Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987); *Henry* v. *Lennox Indus., Inc.*, 768 F.2d 746, 752 (6th Cir. 1985). In the Sixth Circuit, "deliberate intent" could serve as the "aggravating factor," but would probably not be a prerequisite to proving a constructive discharge. *See*, *e.g.*, *Yates*, 819 F.2d at 637.

Thus, at present there are three different and competing versions of the law of constructive discharge. In consequence, a plaintiff's ability to recover for a constructive discharge under the Rehabilitation Act and other federal employment discrimination statutes such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, will turn in many cases on which circuit's law applies. The impact of this conflict between the circuits is particularly apparent here because, according to the standards set forth in the majority of circuits, Dr. Johnson set forth a viable claim of constructive discharge. The only finding at issue on appeal was the determination that NIH had acted with deliberate intent; the finding that intolerable working conditions existed was neither challenged nor disturbed on appeal. The findings left unchallenged here would have sufficed in most circuits, therefore, to sustain a claim of constructive discharge.

Moreover, this difference in legal standards among the circuits by which constructive discharge claims are assessed is critical to the effectiveness of the protections afforded by the disability laws. One of the primary purposes of the Rehabilitation Act was to ensure that persons with disabilities were not unnecessarily precluded or forced from employment

because of their disabilities.[4/] Congress passed the Rehabilitation Act to remedy the "glaring neglect" of the disabled. 118 Cong. Rec. 526 (1972) (Statement of Sen. Percy). The framers of the Act recognized that the nation no longer could "tolerate the invisibility of the handicapped in America." 118 Cong. Rec. 525-526 (1972) (Statement of Sen. Humphrey). As this Court has noted, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to prescribe only conduct fueled by a discriminatory intent." *Alexander* v. *Choate*, 469 U.S. 287, 296-97 (1985). To achieve the remedial purposes that led Congress to pass the Rehabilitation Act, "harms resulting from action that discriminated by effect as well as by design" must be rooted out. *Id.* at 297.

An employer that is insensitive to the needs of an employee with a disability will in many cases cause the same injuries to a disabled employee as does an employer who intentionally seeks to force disabled employees to resign. In both cases, the disabled employee may be forced to resign in order to escape intolerable working conditions. Accordingly, the constructive discharge standard used by the Fourth and Eighth Circuits is inconsistent with the policy of eliminating the barriers that the disabled must overcome in order to enjoy full participation in the federal workplace. *See* Pet. App. 10a-11a; *cf. Aviles-Martinez*, 963 F.2d at 6; *Brooms*, 881 F.2d at 423; *Greenberg*, 870 F.2d at 936; *Hopkins*, 825 F.2d at 472; *Watson*, 823 F.2d at 361; *Derr*, 796 F.2d at 343-44; *Buckley*, 758 F.2d at 1530-31; *Goss*, 747 F.2d at 887-88; *Pittman*, 644 F.2d at 1077.

[4/] Indeed, "[t]he legislative history of the Rehabilitation Act 'demonstrates that Congress intended that the federal government be a model employer of the handicapped.'" *Carter* v. *Bennett*, 840 F.2d 63, 65 (D.C. Cir. 1988) (*quoting Gardner* v. *Morris*, 752 F.2d 1271, 1280 (8th Cir. 1985)); *see also Southeastern Community College* v. *Davis*, 442 U.S. 397, 410 (1979).

Moreover, the Fourth Circuit has imposed an evidentiary burden that is unnecessarily great. As most circuit courts have held, an employer who creates intolerable working conditions which it fails to correct demonstrates that it intends to force the resignation of employees afflicted by the intolerable conditions. *See Derr, 796 F.2d at 344*; *Bourque, 617 F.2d at 65*. No more should be necessary. The logical consequences of an employer's action, or inaction, should be sufficient to support a constructive discharge claim, just as they will suffice to establish intent for other claims under the civil rights acts. *See Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 577 (1978); *see also Kent by Gillespie* v. *Derwinski*, 790 F. Supp. 1032, 1040-41 (E.D. Wash. 1991).

If allowed to stand, the decision below will create a major impediment to the full implementation of the Rehabilitation Act, and may also have a significant and adverse effect on the implementation of other employment discrimination laws. "[A] stringent requirement that an employer's intent be shown is 'inconsistent with the realities of modern employment.'" *Nolan* v. *Cleland*, 686 F.2d at 806, 814 n.17 (9th Cir. 1982) (*quoting Bourque* v. *Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980)). The courts of appeals are divided on the question whether a showing of deliberate intent is a mandatory element of a constructive discharge claim. In these circumstances, guidance from this Court is both necessary and appropriate.

2. The Fourth Circuit's Decision Inappropriately Requires "Direct Evidence" Of "Deliberate Intent"

In addition to reaffirming its requirement that deliberate intent be proved to establish a constructive discharge claim, the Fourth Circuit also held that, as long as an employer makes some effort to accommodate an employee's known disabilities, only direct evidence of deliberate intent to force the employee's resignation will suffice to support a construc-

tive discharge claim. Pet. App. 11a. This holding sets an evidentiary requirement for claims of constructive discharge under the disability laws that is so elevated as to render such claims beyond reach in all but the rarest cases. In reaching this holding, the Fourth Circuit stands along in immunizing from liability employers who take partial, ineffective steps toward resolving a civil rights violation.[5/] The Fourth Circuit's decision presents an important question of federal employment law, about which this Court should provide guidance.

Even assuming *arguendo* the propriety of requiring a showing of deliberate intent, the Fourth Circuit's decision to reject the district court's finding of deliberate intent is in error. There was ample circumstantial evidence from which a trier of fact could infer a deliberate intent on the part of NIH officials to get rid of petitioner. In fact, that is precisely the inference drawn by the district court based on undisputed evidence of such facts as: (1) NIH's initial response to petitioner's request for accommodation included a "suggestion" that she apply for disability retirement, and (2) her immediate supervisor prepared a false performance evaluation with a crude attempt to forge petitioner's signature, ostensibly to "help" plaintiff qualify for disability retirement benefits. Pet. App. 18a-19a, 25a-26a, 37a-38a.

But instead of sustaining the district court's inference, the Fourth Circuit held that evidence of a partial failure to accommodate a disability, even when such action leaves in place intolerable working conditions, defeats a finding of

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[5/] Although the Eighth Circuit concurs in the Fourth Circuit's "deliberate intent" requirement, we have found no circuit court decision, other than the decision below, that largely immunizes from liability employers who take partial, ineffective steps toward resolving a civil rights violation. *Cf. Smith* v. *Cleburne County Hosp.*, 870 F.2d 1375, 1380-81 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989); *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).

deliberate intent, in the absence of "direct evidence" of impermissible intent.[6] Pet. App. 10a-11a.

The decision below departs significantly from the standard previously established by even the Fourth Circuit for protecting against constructive discharge.[7] More importantly, the decision below is inconsistent with this Court's ruling in the employment discrimination context that employers may fairly be assumed to have intended the natural consequences of their actions or inactions. *Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 577 (1978) ("more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting").

The practical consequence of the decision below is clear. "It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown."[8] *Pushkin* v. *Regents of*

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[6] Previously, the Fourth Circuit had held that "[i]ntent may be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions." *Bristow* v. *Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). Thus, although the Fourth Circuit prior to *Johnson* had required civil rights plaintiffs to show that their employer possessed a "deliberate intent" to force them to resign in order to establish a constructive discharge, it allowed such plaintiffs to meet this burden by showing the existence of intolerable working conditions. *Id.*

[7] *See Holsey* v. *Armour & Co.*, 743 F.2d at 209 (holding that deliberate intent may be inferred from the existence of intolerable working conditions).

[8] Moreover, the Fourth Circuit's concern that affirming the district court's judgment would "threaten[] to convert every failure to accommodate" into a constructive discharge claim is misplaced. Pet. App. 9a. An employer's failure to accommodate an employee's disability would support a claim of constructive discharge *only* if the employee's working conditions are intolerable, and remain intolerable as a result of the employer's failure to provide effective accommodations. Often this will not be the case. A failure reasonably to accommodate a disabled employee's desire for a promotion, for example, will support a claim under the Rehabilitation Act, *see Prewitt* v. *United States Postal Serv.*,

(continued...)

the Univ. of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981).

In effect, the Fourth Circuit has significantly weakened the incentive for employers to comply fully and effectively with the requirements of the Rehabilitation Act and other statutes prohibiting discrimination in employment. *See generally Boze* v. *Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990). This result is inconsistent with the mandate of the Rehabilitation Act, implicates an important question of federal employment law, and therefore should not be permitted to stand.

CONCLUSION

This petition should be granted in order to resolve important and recurring legal issues arising under the Rehabilitation Act of 1973 and other statutes prohibiting employment

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[8/](...continued)
662 F.2d 292, 307-09 (5th Cir. 1981), even though denials of promotions standing alone rarely if ever are sufficient to support a claim of constructive discharge. *See Bourque*, 617 F.2d at 65-66; *cf. Satterwhite* v. *Smith*, 744 F.2d 1380, 1383 (9th Cir. 1984) (finding a constructive discharge where employer refused to promote employee and other aggravating circumstances were present); *Clark* v. *Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (same).

discrimination, including an issue as to which there is a split among the Circuit Courts of Appeals.

Respectfully Submitted,

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August 16, 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Sharon JOHNSON, Plaintiff-Appellee,

v.

Donna E. SHALALA, Secretary of Health and Human Services, Defendant-Appellant.

Washington Council of Lawyers, Amicus Curiae.

Sharon JOHNSON, Plaintiff-Appellant,

v.

Donna E. SHALALA, Secretary of Health and Human Services, Defendant-Appellee.

Washington Council of Lawyers, Amicus Curiae.

Nos. 92-1109, 92-1815, 92-1816 and 92-1846

Argued March 2, 1993

Decided April 20, 1993.

Before: WILKINSON and WILLIAMS, Circuit Judges, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

WILKINSON, Circuit Judge:

In this case we must ask when an employer's failure to accommodate an employee under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, amounts to a constructive discharge of that employee. Dr. Sharon Johnson left her employment with the National Institutes of Health; she now claims that she was constructively discharged from her job. The district court agreed, holding that NIH had constructively discharged Dr. Johnson because her supervisors knew of her handicapped condition but failed to give her the accommodation that she requested and to which she was entitled under the Rehabilitation Act. We believe that this legal standard would convert every violation of the Rehabilitation Act into a potential claim for constructive discharge. Applying the proper standard for constructive discharge, we find no evidence that NIH intended to force Johnson to resign, and accordingly we reverse the judgment of the district court.

I.

The record in this case demonstrates an employment relationship that was beset on all sides by strains and difficulties. The plaintiff lived some distance from her place of employment, and she suffered from a variety of genuine medical ailments, which did not yield readily to treatment. These problems were exacerbated by a demanding job that by its nature engendered a fair degree of stress. Reviewing the history of this employment relationship, it seems plain (and NIH now concedes) that while NIH accommodated plaintiff's handicaps in some respects, it did not do all that was required under the Rehabilitation Act. When reviewing these facts for

a claim of constructive discharge, however, the question becomes whether NIH sought to force the plaintiff to resign.

Dr. Sharon Johnson worked from 1984 to 1986 as the Executive Secretary of the Pathobiochemistry Study Section in the Division of Research Grants for the National Institutes of Health, a branch of the Department of Health and Human Services. The Study Section is a group of scientists who review biomedical research grant applications to determine which applicants should receive NIH grants. Dr. Johnson's duties included organizing and attending meetings for the review of grant proposals, preparing written reports of these meetings, and making site visits to grant applicants. She was also responsible for processing appeals of grant denials and for selecting members of the Study Section. Dr. Johnson's position as chair of the Study Section meetings required that she attend them in their entirety. 5 U.S.C. Appendix 2, § 10(e). The meetings sometimes lasted all day and often went beyond normal business hours.

Unfortunately, Dr. Johnson had a medical condition which made the performance of a demanding job even more difficult. She suffered from idiopathic CNS hypersomnolence, a form of narcolepsy or excessive sleepiness that required her to sleep nine or more hours per night and to take short naps during the day when she became tired. The condition often caused Johnson to fall asleep during the meetings she was conducting. Dr. Johnson also suffered from cardiac arrhythmia, a condition that causes a rapid, erratic heartbeat and that precluded her from taking medication to control her narcolepsy. In addition, Dr. Johnson had had surgery for breast cancer and needed periodic checkups to ensure that the cancer did not recur.

The situation was further complicated by commuting problems. Dr. Johnson and her husband moved to Annapolis, Maryland in 1982. She drove daily from Annapolis to NIH's Bethesda offices, a trip that takes approximately one hour

each way. Her narcolepsy, however, frequently required that she pull over for fifteen-minute naps, making it difficult for her to arrive at work at a fixed time.

By memorandum of August 22, 1985, Dr. Johnson requested flexible starting and ending times for her work. At the same time, she requested authorization to change her scheduled work hours more frequently than the permitted July 1 and December 1 dates, so that she could take advantage of "seasonal traffic patterns." In a reply memorandum, Dr. Asher Hyatt, her immediate supervisor, informed Johnson that her request required medical documentation. This memo also stated: "[N]ote that the medical supporting information may be used as documentation in a disability retirement action. Disability retirement may be *offered* if accommodation cannot be reached." Dr. Johnson sent Hyatt a reply memo with a letter attached from her physician. The letter recommended:

> [S]he will need to have flexible working hour schedule with due regard given to possible late arrival and late departure . . . . She is never expected to obtain full or partial recovery and will always be hampered by this condition. If the patient were given a regular work schedule wherein she could participate in a car pool arrangement where she would not be responsible for driving to and from work the above recommendations would not be necessary. However, I understand that she needs to work late at times to attend meetings associated with her current job situation.

After consulting with his supervisor and a physician from Occupational Medical Services at NIH, Hyatt sent Johnson a note saying "The only further accommodation I can make is to the hours of a carpool. I strongly suggest you try to find an appropriate car-pool. There is a locator in Bldg. 31." No adjustment was made to Johnson's work hours to make them more regular, but around this time all employees were sent a memo informing them of the agency's "Flextime Policy,"

which permitted up to fifteen minutes variance in arrival and departure times. In addition, Dr. Johnson was permitted to change her work hours four times a year, rather than the standard two times permitted for other employees.

Dr. Johnson joint a carpool soon after receiving the memo from Hyatt. Meeting the carpool required a twenty-five to thirty minute drive, which, on those days when it was her turn to drive the crpool, made her drive longer than before. In addition, Johnson's duties as chair of the Study Section did not permit her to drive every day with the carpool. She did not, however, communicate her dissatisfaction to Dr. Hyatt.

In February 1986, Dr. Johnson requred that she be allowed to stay in a hotel in Bethesda at government expense for two nights during a three-day Study Section meeting. Dr. Hyatt refused this request, which was contrary to NIH policy.

On April 7, 1986, Dr. Johnson requested five weeks of Leave Without Pay ("LWOP") to begin April 9. Accompanying this request was a letter from Johnson's psychologist advising that Johnson needed at least a month off because she was suffering from "extreme physical and psychological exhaustion," which the psychologist attributed to Johnson's long commute and stress from her NIH workload. On April 8, Dr. Friedman, Johnson's second-level supervisor, approved that request, which would become effective when Johnson completed the summaries of the last meetings and reported on the status of grant applications scheduled to be considered at the next round of meetings.

On April 11, Dr. Johnson requested fifty-two hours of advance sick leave for routine medical examinations. In a memo, Dr. Hyatt approved twenty-nine hours of leave that Johnson had already taken, but informed her that in the future she would have to comply with NIH rules and first request in writing any advance sick leave. On April 16, Johnson spent

two hours at a local hospital for a medical exam. When she submitted a slip for sick leave later that day, Hyatt denied it on the grounds that Johnson had not obtained prior approval. She was, however, allowed to take annual leave for this time. The next day, Hyatt sent Johnson a memo advising her that she would receive no more sick leave until she had again accrued positive sick-leave time, and that no leave of any kind would be granted unless a request was made in writing three days in advance. Johnson regarded this requirement as a unique imposition upon her and as a refusal to accommodate her handicap; her supervisors viewed it as a reasonable response to what had become a substantial sick-leave deficit and as an effort to "control the sisutation, so that we knew where we were and where Dr. Johnson was with her leave requests."

On April 18, Dr. Johnson submitted a handwritten memo on the status of her work to Dr. Friedman. Friedman requested a typed copy, which Johnson produced. Hyatt reviewed the memo and informed Friedman that Johnson's work was "essentially complete." On April 21, Johnson gave James Pike, the executive director of her section, a letter from her psychiatrist, Dr. Thomas Goldman, stating that she was suffering from stress and needed a leave of absence. Johnson also had her attorney call Pike and request the LWOP. On that same day, Johnson filed an EEO complaint, alleging that NIH had not accommodated her handicap and had discriminated against her on the basis of her sex and handicap. Later that day, Pike granted Johnson her LWOP starting April 22.

On May 6, Dr. Goldman sent Pike a letter discussing Johnson's medical and mental condition. Goldman thought that Johnson did "not apper to have the resources to adapt effectively to the stress level in her work environment." In the letter, Goldman recommended that:

> From her description of her job situation and the information I have about it, it is doubtful that a truly reasonable accommodation [sic] can be provided her which would substantially reduce the level of psychic stress to the point where she could comfortably cope without constant aggravation of her symptons. Therefore, barring some major change in her work envirionment, the best alternative from the medical standpoint would be retirement.

Later in the month, Hyatt extended Johnson's LWOP at her request.

On June 6, Pike wrote to Johnson advising her that she would have to be psychiatrically examined before returning to work. Johnson testified that she believed that an examination was impermissible for this purpose, but, fearing discharge, she submitted to the request. During this exam, Johnson was shown the evaluation fabricated by Hyatt. The government states that the psychiatric examination was for the purpose of assisting Johnson's application for disability retirement. Johnson testified at trial that the psychiatrist told her this during the examination.

On August 5, Johnson met with an NIH official to discuss possible reassignment. At this point, Johnson was offered a position at GS-13, a grade lower than her GS-14 position, which she declined. The parties dispute whether she was offered the same salary for the GS-13 position. On August 20, 1986, Dr. Johnson resigned. Subsequently, she was awarded disability retirement benefits.

Johnson eventually filed this lawsuit, alleging violations of Title VII and the Rehabilitation Act. After a bench trial, the district court rejected the Title VII claims but found that NIH had not reasonably accommodated Johnson's handicap and had constructively discharged her by failing to act in the face of known intolerable conditions. The district court

awarded Johnson $57,638.39 in backpay and ordered reinstatement. Separately, the district court awarded Johnson $106,526.63 in attorneys' fees. The government now appeals from the district court's determination that it constructively discharged Johnson.*/

II.

The government claims that the district court applied an erroneous legal standard in finding that NIH constructively discharged Dr. Johnson. In this circuit, the standard for constructive discharge requires a plaintiff to show both intolerable working conditions and a deliberate effort by the employer to force the employee to quit. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). The government challenges only the district court's finding of deliberateness. Deliberateness can be demonstrated by actual evidence of intent by the employer to drive the employee from the job, or circumstantial evidence of such intent, including a series of actions that single out a plaintiff for differential treatment. *EEOC v. Clay Printing Co.*, 955 F.2d 936, 944-46 (4th Cir. 1992). *Accord Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) ("fact that employees were treated identically rebuts any inference" of constructive discharge).

This standard for deliberateness, however, has evolved in cases of age, sex and race discrimination. In these cases, there is ordinarily a relevant pool of workers whose treatment

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*/The government has also appealed the district court's award of backpay, but the specific remedier of bankruptcy and reinstatement are dependent upon the proof of some adverse action taken by the employer, provided here bya the constructive discharge. Johnson challenges on cross-appeal the amount of attorneys' fees awarded by the district court. Given our disposition of the government's appeal on the issue of constructive discharge, we need not address these issues.

can be compared to the treatment accorded plaintiff. In contrast, the Rehabilitation Act demands more of the federal government than simple equality of treatment--the government must affirmatively take steps to accommodate employees with handicaps, unless accommodation would impose undue hardship on the government. 29 U.S.C. § 791; 29 C.F.R. § 1613.704. Treating disabled workers the same as workers without a disability falls short of satisfying the requirements of the Rehabilitation Act. *See Southeastern Community College v. Davis*, 442 U.S. 397, 410-11 (1979). This duty of affirmative accommodation complicates the application of a standard requiring evidence of differential treatment to establish deliberate intent to discharge. The number of individuals with handicaps in any agency is likely to be small, and those individuals will have different handicaps, each requiring different accommodations on the part of the government. The traditional standard of constructive discharge therefore does not neatly translate to the context of the Rehabilitation Act.

In this case, the district court held that NIH had constructively discharged Dr. Johnson because her supervisors were on notice of her need for changes in her working conditions, but failed to affirmatively accommodate her. We think that this standard sweeps too broadly; rather than cabining the doctrine of constructive discharge, the standard adopted by the district court threatens to convert every failure to accommodate under the Rehabilitation Act into a potential claim for constructive discharge.

The consequences of regarding every failure to accommodate an employee as a constructive discharge would be significant. Under this standard, if a plaintiff can prove that the government has violated the Act, she can automatically quit her position without first resorting to the administrative and judicial remedies provided by Congress to mediate these disputes while the employment relationship can still be salvaged. *See* 29 U.S.C. § 794a(a)(1) (incorporating the

provisions for conciliation agreements and equitable remedies available to federal employees under 42 U.S.C. § 2000e-16 and § 2000e-5(f) through (k)). In the interval between a constructive discharge and reinstatement of the employee, both sides lose. The plaintiff may lose the advantages of continuity and understanding gained by being on the job site, and the government irretrievably loses productivity. The plaintiff may recover the backpay that she would have received for working, but the government cannot recover the lost work that it would have received for that compensation. Moreover, once the employment relationship has terminated, the parties may harden their positions and become unable to resolve their dispute. It is far better for all concerned to resolve the dispute while the employment relationship is ongoing.

For these reasons, we believe the district court erred as a matter of law in grounding its finding of constructive discharge upon the premise that NIH failed to afford Dr. Johnson reasonable accommodation. The evidence here is insufficient to show a deliberate intent to discharge an employee when there has been an attempt to accommodate that same employee, even though the accommodation falls short of satisfying the requirements of the Rehabilitation Act. The plaintiff must present some evidence that the employer intentionally sought to drive her from her position.

In this case, Dr. Johnson failed to meet this burden. NIH did not ignore Dr. Johnson's requests--NIH responded, but frequently in ways that she found unsatisfactory. Rather than the thirty-minutes flexibility in her starting time that Johnson requested, NIH gave her fifteen. She was authorized to join a carpool, but without the regularized hours that she wanted. NIH granted her initial request for Leave Without Pay, albeit under the condition that she complete certain necessary work before departure. NIH also offered Johnson a different position, but Johnson refused it because it was at a lower grade. In other instances, NIH complied fully with Dr.

Johnson's requests, permitting her to change duty hours four times a year instead of twice like other employees, and later granting her extended Leave Without Pay. NIH could have done more, and should have done more to conform to the requirements of the Rehabilitation Act, but it did not simply turn its back on Johnson's needs. Finally, once Johnson requested disability retirement, a solution urged by her own psychiatrist, personnel at NIH tried to help her obtain approval for her application. The evaluation falsified by Hyatt, while plainly inexcusable, fails to demonstrate an intent by NIH to force Johnson from her position because the evaluation was prepared only after Johnson herself requested disability retirement. The evidence put forth by Johnson may well demonstrate a lack of flexibility or magnanimity on the part of her supervisors, but what it does not demonstrate is a deliberate intent to force Johnson from her job. NIH tried, but failed, to accommodate Johnson's handicaps.

We hasten to add that ours is not a sweeping holding. We recognize that a complete failure to accommodate, in the face of repeated requests, might suffice as evidence to show the deliberateness necessary for constructive discharge. And, of course, deliberateness can always be shown through direct evidence that an employer intended to force an employee from his or her job. However, in this case of partial or imperfect accommodation in the context of an employment relationship that was difficult for everyone involved, we do not think that the elements of a constructive discharge have been met.

III.

For the above reasons, the judgment of the district court is

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed May 17, 1993

No. 92-1109
CA-89-2999-HM

SHARON JOHNSON, *Plaintiff - Appellee*

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, *Defendant - Appellant*

WASHINGTON COUNCIL OF LAWYERS
Amicus Curiae

No. 92-1815
CA-89-2999-HM

SHARON JOHNSON, *Plaintiff - Appellant*

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, *Defendant - Appellee*

WASHINGTON COUNCIL OF LAWYERS
Amicus Curiae

No. 92-1816
CA-89-2999-HM

SHARON JOHNSON, *Plaintiff - Appellee*

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, *Defendant - Appellant*

WASHINGTON COUNCIL OF LAWYERS
Amicus Curiae

No. 92-1846
CA-89-2999-HM

SHARON JOHNSON, *Plaintiff - Appellant*

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, *Defendant - Appellee*

WASHINGTON COUNCIL OF LAWYERS
Amicus Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellee/cross appellant Johnson's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For The Court

/s/ Bert M. Montague

Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

SHARON JOHNSON, PH.D. :

V. : CIVIL NO. HM- 89-2999

DR. LOUIS W. SULLIVAN :

MEMORANDUM

Plaintiff, Dr. Sharon Johnson, brought this action alleging sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and handicap discrimination under the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. On February 8, 1991, this Court denied the motions for summary judgment filed by both sides. However, the Court did find that plaintiff had shown that she was an "otherwise qualified individual with handicaps" under the Rehabilitation Act. (Court's Memorandum and Order of February 8, 1991, at 28). The Court conducted a bench trial beginning on June 24, 1991, and ending on July 3, 1991. The Court has considered all the testimony, the depositions and other evidence admitted at trial, and the proposed findings of fact and conclusions of law submitted by the parties after trial, and is now prepared to rule.[1/]

[1/]Plaintiff has filed a motion to strike certain portions of defendant's proposed findings of fact, arguing that the evidence did not support the proposed facts. The Court can decide the facts from its recollection of the trial and will accordingly deny the motion.

I. FINDINGS OF FACT

(1) Dr. Sharon Johnson holds a Ph.D. in biochemistry from the Massachusetts Institute of Technology. Prior to coming to work at the National Institutes of Health ("NIH"), Dr. Johnson held the positions of Associate Research Professor of Chemistry, Polytechnic Institute of New York; Assistant Professor of Biochemistry, University of Pittsburgh; Senior Chemist, Westinghouse Research and Development Laboratories; Associate Professor of Chemistry, Vassar College; and Research Fellow in Fundamental Research, Carnegie Mellon Institute.

(2) On September 9, 1979, Dr. Johnson began to work for the National Institute of Health ("NIH") in the Grants Associate Program, a one-year training program. After the training, she worked in the National Institute of Dental Research until July, 1984. In July, 1984, Dr. Johnson began work in the Division of Research Grants ("DRG") of NIH.

(3) Dr. Johnson states that Dr. Asher Hyatt, her supervisor, kissed her on her first day of work and sexually harassed her throughout her employment. She states that he called her "Luv" and other diminutive names, touched her shoulders and back on several occasions, embraced her on one occasion, and asked her to have lunch with him or meet him for drinks on several occasions. Dr. Hyatt admits to calling her "Luv." He also admits that this was a term of "affection" that he used only with women and children. He further admits to touching her shoulders on occasion, but never kissing or embracing her. Ms. Billie Mackey, an employee at NIH and president of a women's group at NIH, testified that Dr. Johnson spoke with her and to the women's group "SHER" about sexual harassment from her supervisor. Dr. Johnson was embarrassed to talk about the harassment and did not give details to Ms. Mackey or the group.

(4) Plaintiff, Dr. Sharon Johnson, suffers from idiopathic CNS hypersomnolence, which is a form of excessive sleepiness or narcolepsy requiring her to sleep nine or more hours in a day. She has had this condition since her teens. Dr. Johnson also has cardiac arrhythmia, a condition of the heart which causes atrial fibrillation, a rapid, erratic heartbeat which can lead to cardiac arrest or strokes. This heart condition prevents Dr. Johnson from being able to take stimulants which are normally prescribed for narcolepsy. Dr. Johnson's narcolepsy and cardiac arrhythmia are aggravated by stress. In addition, Dr. Johnson has had surgery for breast cancer and requires periodic check-ups to monitor any recurrence. This Court has previously ruled that Dr. Johnson's conditions render her "handicapped" within the meaning of the Rehabilitation Act. Moreover, based on her satisfactory performance at NIH over a number of years, this Court found that Dr. Johnson was an "otherwise qualified handicapped individual" within the meaning of the Rehabilitation Act.

(5) In 1982, Dr. Johnson's husband relocated to the Baltimore office of the Westinghouse Corporation. At that time, they moved to Annapolis which was approximately equidistant between Dr. Johnson's workplace at NIH, in Bethesda, Maryland, and her husband's job in Baltimore. Since the move to Annapolis, Dr. Johnson commuted by car to NIH, approximately one hour drive each way. Because of her narcolepsy, at times she became too sleepy to drive. Apparently Dr. Johnson has some warning before she falls asleep, and is able to pull off the road and nap if needed. Because of her sleep disorder, Dr. Johnson had difficulty coming into work at the same time each day and requested some accommodation.

(6) Prior to working in DRG, Dr. Johnson had never found it necessary to ask for accommodation of her handicaps because her previous supervisors allowed her the flexibility she needed with regard to her work hours and leave for

medical appointments. In her previous jobs, Dr. Johnson commuted similar distances to work.

(7) At NIH, Dr. Johnson held the GS-14 position of Executive Secretary of the Pathobiochemistry Study Section, which is a group of scientists who review biomedical research grant applications to determine which applicants should receive NIH grants. As Executive Secretary, Dr. Johnson was required to attend the meetings of the Study Section, take minutes of the meetings, and write reports which summarize the Study Section's discussion on each grant application. She was also responsible for conducting site reviews of the applicants, processing appeals of grant denials, and selecting members of the Study Section. Dr. Asher Hyatt, Chief of the Biomedical Sciences Review Section, was Dr. Johnson's supervisor. Dr. Johnson's position required her to attend various meetings, all of which were held in locations other than the Westwood Building where she worked. These meetings were often all-day meetings that would continue past the end of the normal workday.

(8) Dr. Johnson spoke with Dr. Hyatt about accommodation for her handicap. Dr. Hyatt asked her to put such a request in writing. On August 22, 1985, Dr. Johnson, in a memorandum to Dr. Hyatt, requested flexible starting and ending times so that she could pull over to nap if she became sleepy while driving. She also asked that she be allowed to change her regularly scheduled working hours at times other than on the officially permitted dates of July 1 and December 1 "so as to take advantage of seasonal traffic patterns and minimize total work hours."

(9) On August 27, 1985, in a reply memorandum, Dr. Hyatt stated that he had "consulted with the DRG Personnel Office" and learned that "accommodation consideration for your handicap condition requires that you provide appropriate medical supporting documentation." He asked that Dr.

Johnson's physician submit documentation that addressed several specific questions. The memo went on to say:

> Also note that the medical supporting information may be used as documentation in a disability retirement action. Disability retirement may be *offered* if accommodation cannot be reached.

Plaintiff's Ex. 26 (emphasis in original).

(10) On September 6, 1985, Dr. Johnson sent a memorandum to Dr. Hyatt in which she indicated surprise that such extensive documentation would be needed. On October 1, 1985, Dr. Johnson sent Dr. Hyatt a memorandum describing her handicaps and attached a letter from her physician, Dr. Goldstein, describing her narcolepsy, heart condition, and breast cancer. Dr. Goldstein made the following recommendations:

> She will need to have a flexible working hour schedule with due regard given to possible late arrival and late departure. Fortunately her condition is such that she can predict when attacks are about to occur and she is able to take short naps to regain a normal state of consciousness. She is never expected to obtain full or partial recovery and will always be hampered by this condition. If the patient were given a regular work schedule wherein she could participate in a car pool arrangement where she would not be responsible for driving to and from work the above recommendations would not be necessary. However, I understand that she needs to work late at times to attend meetings associated with her current job situation.

Plaintiff's Ex. 29. Dr. Johnson sent copies of her memorandum and Dr. Goldstein's letter to Dr. Friedman and DRG personnel officers.

(11) Dr. Friedman, Chief of the Referral and Review Branch and Dr. Johnson's second level supervisor, reviewed Dr. Johnson's request and informed Dr. Hyatt that DRG policy permitted Dr. Hyatt to grant 15 minutes of flexibility in start and stop time, but that flexitime greater than 15 minutes had to be approved by Dr. Friedman. However, neither Dr. Hyatt nor Dr. Friedman informed Dr. Johnson that 15 minutes flexibility was permitted. Both Dr. Hyatt and Dr. Friedman acknowledged during the trial that they never considered granting plaintiff flexible starting and ending times in excess of 15 minutes because it was not DRG policy.

(12) Between April and August, 1985, Dr. Johnson had several conversations with Mr. Kevin Murphy, a personnel management specialist at NIH at the time. Dr. Johnson wanted information regarding reasonable accommodation of her handicap and was referred to Mr. Murphy by Ms. Carol Storm. Mr. Murphy met with Dr. Hyatt in April and in August of 1985 to discuss reasonable accommodation and disability retirement for Dr. Johnson. Mr. Murphy specifically told Dr. Hyatt that as the supervisor, it was Dr. Hyatt's responsibility to accommodate Dr. Johnson. In addition, Mr. Murphy spoke with Mr. Pike and Dr. Friedman regarding Dr. Johnson.

(13) On October 7, 1985, Dr. John D. Robertson, the Personnel Officer, sent plaintiff's request for accommodation and documentation to the Assistant Director of the Occupational Medical Services ("OMS") at NIH. In his cover memorandum, Dr. Robertson noted that the plaintiff was being permitted to change her tour of duty four times a year rather than the normal twice a year. On October 30, 1985, plaintiff sent a memorandum to Dr. Hyatt, in which she advised him that Dr. Robertson had given her a copy of his memo to OMS. She indicated that being able to change her hours four times a year was helpful but that she disagreed with Dr. Robertson's perception that she rarely scheduled

meetings outside of her regular hours. She stated that having a car pool would only be "partially satisfactory for a person with my responsibility as I go directly to other locations in order to perform my duties as an executive secretary."

(14) The OMS assigned the evaluation of plaintiff's request to Dr. Thomas Lawford, an OMS physician working under the supervision of Dr. Wasserman. Dr. Lawford spoke with Dr. Johnson and her physician. On November 29, 1985, he wrote a report concurring with plaintiff's physician that plaintiff suffered from a form of narcolepsy. He noted that her "condition causes her to fall asleep while driving," and that she has to pull over and sleep for about 15 minutes, often more than once during her hour long drive from Annapolis. Dr. Lawford recommended that Dr. Johnson either be given flexibility in her arrival and departure times at work, or her hours be regularized so that she could join a car pool.

(15) On December 12, 1985, Dr. Robertson provided a copy of Dr. Lawford's recommendations to Dr. Hyatt. On December 13, 1985, Dr. Hyatt sent the plaintiff a note saying: "The only further accommodation I can make is to the hours of a car-pool. I strongly suggest you try to find an appropriate car-pool. There is a locator in Bldg. 31 (496-6851)." (Ex. 35). Dr. Hyatt admitted that to his knowledge no one in DRG adjusted plaintiff's work hours to make them regular to facilitate her participation in a carpool.

(16) Dr. Johnson joined a car pool soon after she received Dr. Hyatt's memorandum. However, this arrangement was unsatisfactory. She had to drive 25 to 30 minutes to meet the car pool members and then they would take turns driving. Thus, on the days on which it was her turn to drive, her commute was even longer than before joining the car pool. Moreover, because her working hours had not been regularized, on some days she was unable to participate in the

car pool. Plaintiff continued to car pool until she left her position.

(17) In December, 1985, Dr. Johnson called Dr. Martha Bryan, an NIH handicap program manager, to ask for information on a reasonable accommodation. Dr. Bryan informed Dr. Johnson that apart from counseling, she could provide no assistance in this regard.

(18) In February, 1986, Dr. Johnson had a three-day Study Section meeting in a hotel in Bethesda. Dr. Johnson requested that Dr. Hyatt allow her to stay in the hotel for two nights at government expense, in order to avoid commuting after the long meetings. Dr. Hyatt refused this request.

(19) During the Winter of 1985 and Spring of 1986, Dr. Johnson was experiencing a great deal of stress at work, partly because of a somewhat increased workload and partly due to the difficulty she was having in getting accommodation for her handicap.

(20) On April 7, 1986, Dr. Johnson requested five weeks of Leave Without Pay ("LWOP") beginning April 9, 1986. In support of her request, she attached a letter from her clinical psychologist, who stated that she had advised Dr. Johnson to take at least a month's leave from work as she was suffering from "extreme physical and psychological exhaustion." (Paper No. 51, Ex. 1, attached Ex. 15). The psychologist explained that "extremely long commuting time because of her motor pool participation, and increased workload and other demands are causing her stress level to become a matter of concern." Id. Dr. Thomas Goldman, testifying at trial as an expert in psychiatry, stated that he evaluated Dr. Johnson in the Spring of 1986, and found her to be "anxious," "overwrought," and "depressive." Dr. Goldman stated that in his opinion, the conditions in her workplace were causing Dr. Johnson to experience a severe

stress reaction which was aggravating her narcolepsy and cardiac arrhythmia.

(21) On April 8, 1986, Dr. Friedman approved the leave on the condition that it would not begin until Dr. Johnson gave written assurance to her supervisor that "everything needed to complete the summary statements for the last study section round has been completed" and provided a "report of the status of applications pending review of the next round." (Paper No. 51, Ex. 1, attached Ex. 16).

(22) On April 11, 1986, Dr. Johnson requested 52 hours of advance sick leave for routine medical examinations. Dr. Hyatt approved 29 hours of the leave, which he claimed was the amount of sick leave that Dr. Johnson had already used up. Dr. Hyatt also directed, through a memorandum, that any additional sick leave had to be requested and approved in advance in writing. Dr. Johnson received this memorandum no earlier than April 16, 1986. On April 14 and April 15, 1986, Dr. Johnson attended a professional conference in New York. When Dr. Johnson submitted a slip requesting administrative leave for the two-day conference, Dr. Hyatt denied the request stating that prior approval had not been obtained.

(23) On April 16, 1986, Dr. Johnson spent two hours in the morning at a hospital for an evaluation related to her breast cancer. When she returned to work, she submitted a slip for two hours of sick leave. Dr. Hyatt denied this request on the ground that it had not been approved in advance. Dr. Hyatt testified that it was customary policy in DRG to approve small amounts of leave after the leave was taken.

(24) On April 17, 1986, Dr. Hyatt sent a memorandum to Dr. Johnson which stated that Dr. Johnson would be granted no further sick leave until her sick leave balance reached zero, and that no leave of any kind would be granted unless leave was sought in writing three days in advance.

Dr. Hyatt testified that he has not placed such restrictions on leave on any other employee.

(25) On April 17, 1986, Dr. Johnson completed a handwritten memorandum to Dr. Friedman, describing the status of her work. On April 18, 1986, Dr. Johnson tried to give the memorandum to Dr. Friedman. Dr. Friedman said he would not accept a handwritten memorandum and handed Dr. Johnson a memorandum, dated April 17, 1986, in which he demanded to know why he had not received the status memorandum. On April 18, 1986, later in the day, Dr. Johnson provided Dr. Friedman with a typed copy of her status memorandum. Dr. Hyatt reviewed the status memorandum and confirmed to Dr. Friedman that Dr. Johnson's work was "essentially complete." Dr. Johnson was apparently still not released on Leave Without Pay.

(26) On April 21, 1986, Dr. Johnson provided Mr. Pike and her supervisors with a letter from Dr. Thomas Goldman, who had interviewed Dr. Johnson the previous day and confirmed that Dr. Johnson was suffering from stress and required a leave of absence. On the same day, at Dr. Johnson's request, her attorney, Mr. Gary Simpson, called Mr. Pike to ask that LWOP be granted. On the same day, April 21, 1986, Dr. Johnson filed an EEO complaint, alleging that DRG had failed to accommodate her handicap, refused to grant her LWOP, and discriminated against her on the basis of her sex and handicap. Later that day, after talking with Dr. Johnson and her attorney, Mr. Pike granted Dr. Johnson LWOP starting on April 22, 1986.

(27) On May 16, 1986, Dr. John Robertson, DRG Personnel Officer, wrote to Dr. Wasserman, OMS's Medical Director, asking her to determine whether OMS would support disability retirement for Dr. Johnson. On June 2, 1986, Mr. Robertson, Dr. Wasserman, Mr. Pike, Dr. Jerome Green, Mr. Murphy, DRG Personnel Specialist, and Dr. Molly Strauss, an OMS psychiatrist, met to discuss Dr.

Johnson's leave status and the possibility of disability retirement.

(28) On June 4, 1986, Dr. Johnson submitted an application for disability retirement to the DRG personnel office. According to Dr. Johnson, Mr. Simpson, her attorney at the time, and Dr. Goldman, a psychiatrist who evaluated her, Dr. Johnson was not sure what she should do with regard to her employment at NIH. She wanted to continue to work, preferably under a different supervisor. However, given the difficulty she was experiencing in obtaining accommodation for her handicap and the resulting stressful environment at work, Dr. Johnson felt that disability retirement was her only available option.

(29) On June 5, 1986, Dr. Hyatt drafted an evaluation of Dr. Johnson, backdated to April 1, 1986, which stated that her performance was unsatisfactory. Dr. Hyatt admitted that this review was not a true judgment of her performance but was intended to enable her to receive disability retirement. Dr. Hyatt cut out Dr. Johnson's signature from a previous progress review and affixed it to this false evaluation. He testified that he did not ask her to sign this evaluation because he knew she would refuse. Dr. Hyatt states that he made this false evaluation at the request of Mr. Simpson, Dr. Johnson's attorney, to facilitate disability retirement. However, Dr. Hyatt never met with Mr. Simpson, and Mr. Simpson denied any discussion with anyone regarding a false negative appraisal. Moreover, Mr. Pike stated that he had no discussion with Mr. Simpson or anyone else regarding performance appraisals for Dr. Johnson.

(30) On June 6, 1986, Mr. Pike wrote a letter to Mr. Simpson stating that "it will be necessary for Dr. Johnson to be evaluated by [OMS's] Medical Director and/or psychiatrist prior to her return to duty." (Pltf's Ex. 69). At trial, Mr. Pike stated that the letter did not set forth a "strict requirement" that Dr. Johnson be examined. However, during his

deposition, Mr. Pike indicated that compliance was required. Dr. Johnson found out from the Office of Personnel Management that such an order may be illegal. Furthermore, Dr. Johnson wrote to Congressman Barnes to obtain further information, and received a response that such an examination could not be required.

(31) Because she says she feared loss of her job, Dr. Johnson went for two psychiatric evaluations conducted by Dr. Molly Strauss, an OMS physician, on July 17 and July 24, 1986. Dr. Strauss testified at trial that Dr. Johnson told her that she objected to this examination. During these evaluations, Dr. Johnson was informed for the first time of Dr. Hyatt's unsatisfactory reviews of her performance. Dr. Strauss read parts of the review to Dr. Johnson. Dr. Strauss testified that she, Dr. Strauss, was not aware that the appraisal was not done in the normal course of business. Not knowing that the evaluation was false, Dr. Johnson was extremely distressed to learn about such a negative appraisal from her supervisor. Dr. Strauss testified that Dr. Johnson wanted to keep working. However, Dr. Strauss did not attempt to have Dr. Johnson assigned to a new position.

(32) On August 5, 1986, Dr. Johnson met with Dr. Jerome Green, director of DRG, to discuss the possibility of reassignment to another position not under Dr. Hyatt's supervision. Dr. Johnson states that Dr. Green insisted that retirement was the only option. At trial, Dr. Green testified that he was surprised at Dr. Johnson's request for reassignment since she had already applied for disability retirement. He admitted that he considered no specific alternative positions for Dr. Johnson in DRG.

(33) Defendant states that on August 5, 1986, Mr. Hadley, a DRG personnel manager, certified that plaintiff had been contacted and was unwilling to accept a position at a lower grade, GS-13, at her present salary. Plaintiff says she was not offered the same salary. She says that she told Mr.

Hadley that she would prefer a job at her current level, GS-14. In any event, this Court finds that aside from this one possible reassignment, no effort was made by anyone in NIH to assign Dr. Johnson to another position. All the witnesses who testified regarding the possibility of reassigning plaintiff stated that to their knowledge, no steps were taken to find another position for plaintiff.

(34) On August 20, 1986, Dr. Johnson submitted her resignation, in which she wrote:

> For health and personal reasons. Have filed OPM retirement form 150 June 4, 1986. Existing medical conditions exacerbated by job stress related to:
>
> (1) Refusal of supervisor to reasonably accommodate a medically documented handicap.
>
> (2) Personally directed threats and verbal abuse; harassment on medical leave.
>
> (3) Frequent, abrupt, and erratic changes in instruction and policy interpretation from supervisor, leading to stressful and confusing situations. Supervisor frequently has no memory of previous instructions.
>
> (4) Supervisor attempted to limit job-related personal contacts by requiring his clearance on contacts with other professionals and with the Personnel Office, leading to stressful working conditions.

Paper No. 53, Ex. 77. Later that same day, plaintiff sent a letter in which she stated:

> Enclosed is a revised resignation action on Form 50. Please substitute this for the longer version I very recently sent. Also enclosed is a resignation letter.

Paper No. 53, Ex. 79. The revised version of the form stated:

> For health and personal reasons relating to job stress which exacerbated existing medical condition. Have filed OM Form 1503 for retirement.

Paper No. 53, Ex. 80.

(35) On April 14, 1987, plaintiff was notified by OPM that her application for disability benefits had been denied. Plaintiff filed a request for reconsideration, and through her attorney, requested DRG officials to supply further documentation in support of her application for disability retirement. Dr. Hyatt and Mr. Hadley provided further statements. Subsequently, on February 3, 1988, OPM reconsidered its previous decision and granted plaintiff retirement benefits retroactive to April 22, 1986.

(36) After her separation from NIH, Dr. Johnson attempted to find new employment, but was unable to secure full time employment until April 9, 1990. Before that time, she held the following part-time positions: a research scientist at the Johns Hopkins Medical School, a chemist for Anne Arundel County, and consultant for the Eastern Research Group. On April 9, 1990, Dr. Johnson assumed the position of Executive Secretary at the Food and Drug Administration. She remained at that position until she resigned to purchase a flower shop.

II. CONCLUSIONS OF LAW

A. Handicap Discrimination Claim

The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., ("the Act"), provides a comprehensive scheme to combat all forms of discrimination against the handicapped. *Allen v. Heckler*, 780 F.2d 64, 67 (D.C. Cir. 1985). Section 504 or Title V of the Rehabilitation Act provides, in relevant part:

> "No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

29 U.S.C. § 794. In particular, the Act prohibits employers from discriminating against otherwise qualified individuals with handicaps. Federal agencies, such as the Department of Health and Human Services, have responsibilities beyond the non-discrimination requirements of Section 504; under Section 501 of the Act, federal agencies must undertake affirmative action on behalf of the handicapped. 29 U.S.C. § 791(b). Section 501 requires each department or agency of the executive branch to submit to the Equal Employment Opportunity Commission and the Interagency Committee on Handicapped Employees "an affirmative action plan for the hiring, placement, and advancement of individuals with handicaps." *Id.* Moreover, "such plan will include a description of the extent to which and methods whereby the special needs of the employees with handicaps are being met." *Id.*

In a Rehabilitation Act claim, the plaintiff must prove that she is 'handicapped' within the meaning of the Act, that

she was otherwise qualified for the job in question, and was discriminated against because of her handicap by an employer who receives federal funding. 29 U.S.C. § 794. The Act defines "individual with handicaps"[2/] as:

> Any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,[3/] (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706 (8)(B). This Court has previously ruled that the combination of plaintiff's illnesses render her "an individual with handicaps" under the Rehabilitation Act. (Court's Memorandum and Order of February 8, 1991, p. 28).

Plaintiff must also show that she is "otherwise qualified"[4/] for the job in question, by establishing that in spite of her handicap, she was qualified for the job or would be qualified for the job with or without reasonable accommodation. *Southeastern Community College v. Davis*, 442 U.S. 397, 403-07, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979). Based on plaintiff's performance reviews of "fully satisfactory" up to April 1, 1986, this Court previously ruled that plaintiff has

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[2/]Previously, the term used was "handicapped individual."

[3/]The Department of Labor regulations explain that "life activities" may be considered to include, among other activities, vocational training, employment, transportation. 41 C.F.R. § 60.741, appendix A (1987).

[4/]The EEOC regulations state that:

> "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . [sic]

29 C.F.R. § 1613.702 (f).

shown that she was an "otherwise qualified individual with handicaps" under the Rehabilitation Act. The evidence presented at trial was consistent with the Court's earlier ruling.

A federal employer has an obligation to provide reasonable accommodation for the handicapped, as long as the accommodation would not impose "undue hardship" on the employer. *Carter v. Bennett*, 651 F. Supp. 1299, 1300 (D.D.C. 1987); *aff'd*, 840 F.2d 63 (D.C. Cir. 1988); *Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981); 29 C.F.R. § 1613.704. The employer bears the burden of persuading the Court that it provided reasonable accommodation or that it was unable to accommodate plaintiff. *Carter*, 651 F. Supp. at 1300. However, once the employer puts forth credible evidence of reasonable accommodation or inability to accommodate, plaintiff has the burden of providing evidence regarding possible accommodation to rebut the employer's evidence. *Id.*

Thus, the issue for determination is whether defendant provided "reasonable accommodation" for plaintiff's handicap. Plaintiff sought, verbally and through a formal written request, the accommodation of thirty minutes of flexibility with regard to starting and ending times at work, plus the opportunity to change her tour of duty more frequently. By "thirty minutes of flexibility" plaintiff meant that if her tour of duty was, for example, 8:00 a.m. to 4:00 p.m., then plaintiff could arrive as late as 8:30 a.m. and still be considered on time. She could make up for arriving later by leaving later. At trial, defense counsel tried to argue that plaintiff already had thirty minutes of flexibility because she could come in fifteen minutes early or fifteen minutes late and still be considered on time, allowing a thirty minute span of time within which she could arrive. However, the Court finds this argument totally unconvincing, particularly because plaintiff's supervisors testified that they understood the request to mean that plaintiff could come in thirty minutes

before or after her official starting time. Moreover, although it was apparently permissible for an NIH supervisor to allow fifteen minutes of flexibility, there is no indication in the record that plaintiff was even told that she had fifteen minutes of flexibility.

Plaintiff, Dr. Sharon Johnson, tried to obtain this flexibility through various avenues. She spoke to her supervisors, people in the personnel department, the NIH handicap services coordinator, all to no avail. The only "accommodation" she was provided was Dr. Hyatt's direction that she join a car pool. Certainly, Dr. Johnson was always free to join a car pool; Dr. Johnson's joining a car pool can hardly be considered an accommodation by her employer. Moreover, plaintiff's work hours were not sufficiently regularized so that she could regularly participate in the car pool. She often had meetings that ran later than regular hours, so that she had to drive herself to work.

The Fourth Circuit has stated that the Office of Personnel Management's directives provide important guidance for a court's consideration of whether a federal agency has reasonably accommodated an employee. *Rodgers v. Lehman*, 869 F.2d 253, 258-59 (4th Cir. 1989). The "Handbook on Reasonable Accommodation," published by the United States Office of Personnel Management, provides:

> Regulations require agencies to make reasonable accommodation unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of the program.

Pltf.'s Ex. 1. p. 3. Factors listed in determining "undue hardship" include the cost of the accommodation and adverse effect on the program. However, the manual states that "all alternatives should be explored." *Id.* The manual specifically lists "Adjusting Work Schedules" as a type of reasonable accommodation, explaining as follows:

> Some handicapped individuals in our society possess great productive potential which goes unused because they cannot meet the requirements of a standard 40-hour work week. By taking advantage of the flexibilities of alternative work schedules, accommodation can be made for various disabilities. Flexible or altered work schedules may be needed to accommodate disabled workers. Mobility impaired employees who find it difficult to maneuver during peak periods on public transportation systems *might start their working day a little earlier or later. Workers requiring medical treatment may need a flexible schedule one or two days a week.* Persons who need rest periods could adjust their schedules to make up the time at the beginning or end of the workday. Sometimes employees, because of particular disabilities such as diabetes and epilepsy, should work a regular schedule even though others holding comparable jobs are required to work differing shifts. *This is especially true if the disability is affected by a person's eating or sleeping schedule.*

Id., at 6 (emphasis added). Thus, according to OPM, flexible working hours may be needed to accommodate a handicapped worker. Moreover, the manual suggests the very types of accommodations that plaintiff may have benefited from: flexible starting or ending hours, regularizing of work hours that are otherwise variable, rest periods during the day, and flexibility in order to receive medical treatment.

The National Institutes of Health's personnel manual also has provisions on reasonable accommodation and adopts OPM's definition of reasonable accommodation. The NIH manual encourages the approval of "flexible or altered work schedules as needed to accommodate disabled employees." Pltf's Exh. 2. Under a section entitled "Adjusting Work Schedules," the manual further provides:

> "Employees who cannot meet the requirements of the regularly scheduled tour of duty for their position for reasons associated with their disability *(examples include requirement for medical treatment, need for rest periods, or difficulty getting to work)*, should be granted flexible working hours or rest periods if such accommodation can he made without disruption or hardship to the organization."

Id. (Emphasis added).

Both Dr. Hyatt and Dr. Friedman testified that at the time Dr. Johnson was employed at DRG they had not read the OPM or NIH manual on handicap accommodation. Although plaintiff stated in her written request that she was seeking accommodation for her handicaps, her supervisors did not consider the request to be accommodation for an individual with handicaps. Both Dr. Hyatt and Dr. Friedman testified that they believed that they had no authority to grant any further flexibility to Dr. Johnson. Dr. Hyatt admitted that had he read the manual, he would have acted differently towards plaintiff's requests. Dr. Hyatt admitted that allowing Dr. Johnson thirty minutes of flexibility in starting and ending times would not have interfered with her duties at DRG. He stated that his personal opinion was that fixed starting and stopping times were unnecessary; however, as a manager, he had to follow DRG's "irrational" policy. Thus, clearly there was no hardship to defendant in allowing plaintiff the flexibility she requested.[5/]

[5/]Moreover, starting in October, 1987, NIH allowed all employees thirty minutes of "flexitime" in arriving and departing from work. Thus, clearly such an accommodation was not a hardship to defendant.

After hearing all the testimony in this case and examining all the evidence, this Court is convinced that plaintiff was not provided with reasonable accommodation. Dr. Johnson only asked for a small amount of flexibility in her arrival and departure times. She testified that had she been able to open a dialogue with her superiors regarding reasonable accommodation, she might have asked for further accommodation, such as brief rest or nap periods during the day. Dr. Johnson explored all possible avenues for obtaining accommodation, speaking to numerous people at NIH, many of whom testified at trial. It is most unfortunate that no one took action to accommodate her.

Defendant argues that Dr. Johnson's problem was that she commuted a long distance, and that defendant had no responsibility to accommodate for this. This Court must disagree. While it is true that some of Dr. Johnson's difficulty from her narcolepsy and other handicaps may have been alleviated if she did not drive to work, the employee in this case was neither commuting an inordinately long distance, nor requesting any extraordinarily burdensome accommodation.[6/] Defendant also argues that allowing plaintiff to change her tour of duty four time [sic] a year rather than two was an accommodation. The Court agrees that it was an accommodation, but it was insufficient to meet plaintiff's needs.

Furthermore, the Court finds that plaintiff was not provided with reasonable accommodation with regard to her requests for leave to attend to medical problems. There is evidence that whereas it was common practice at DRG to allow employees to obtain approval for leave after it was taken, plaintiff was not allowed to do so on several occasions. Moreover, because Dr. Johnson had special medical needs,

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[6/]Moreover, the Court is cognizant, as employers should be, that sometimes, as in this instance, family considerations may require employees to commute some distance to work.

her employer should have provided her with more flexibility than other employees as a reasonable accommodation for her handicaps. Certainly the employer has the right to ensure that all necessary work will be completed. However, even within these parameters, the Court feels that more sensitivity and flexibility was due to Dr. Johnson with regard to her requests for leave. As for plaintiff's contention that she was forced to submit to a psychiatric evaluation, the Court finds that there was some degree of coercion in the "request" that she be evaluated at OMS. If NIH did not intend that the evaluation be required, they could certainly have told her that she need not attend if she did not want to. In any event, because there is more than sufficient other evidence that NIH did not reasonably accommodate plaintiff, the Court need not make a finding as to whether NIH's actions with regard to the psychiatric evaluation were illegal. Based on all the information before the Court, the Court concludes that NIH violated the Rehabilitation Act by failing to reasonably accommodate plaintiff.

Plaintiff claims that she was constructively discharged from her employment at NIH. The Court of Appeals for the Fourth Circuit has ruled:

> A constructive discharge occurs when "an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job." *Holsey v. Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) [citations omitted]. A plaintiff alleging constructive discharge must therefore prove two elements: deliberateness of the employer's action, and intolerability of the working conditions.

Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Deliberateness exists only if the employer intended to force the employee to leave. *Id.* Intent may "be inferred through circumstantial

evidence, including a failure to act in the face of known intolerable conditions." Id. Whether the working conditions were "intolerable" must be assessed "by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign." *Id.*

Plaintiff states that she felt compelled to file for disability retirement and later resign because of the intolerable situation she faced at work. According to plaintiff, her employer's continued refusal to try to accommodate her handicaps and insensitivity regarding her need to take medical and other leave led to an extremely stressful situation at work. Dr. Johnson contends that she was pressured to file for disability retirement. She testified that she felt that everyone at DRG was trying to push her out. She felt that the situation was hopeless and finally submitted her resignation. Defendant argues that a reasonable person would not have felt compelled to resign while an application for disability retirement was pending.

First, the Court believes that Dr. Johnson was indeed pressured to file for disability retirement. Her employers failed to provide her with the accommodation she required and did not seriously consider her for any alternative positions. Although Dr. Johnson tried every possible avenue of relief, speaking with supervisors on all levels, consulting with handicap specialists and personnel specialists, the only alternative given to her was disability retirement. After filing for disability, Dr. Johnson was pressured to submit to psychiatric evaluations, at which she found out that her supervisor had written an extremely negative appraisal of her. This negative appraisal was a falsified document, purportedly signed by Dr. Johnson herself. At the time, however, Dr. Johnson did not know that the document was backdated and did not contain a true appraisal of her work. This Court believes that a reasonable person in Dr. Johnson's situation may well have felt compelled to resign, even though her disability application was pending. Thus, plaintiff has met

the "intolerability" requirement of *Bristow*. Moreover, under *Bristow*, the employer's intent to force the employee to resign may "be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions." *Id.* In the instant case, plaintiff's supervisors had ample notice over several months that she needed some changes in her working conditions; however, they failed to act to help her. Thus, under the standard articulated in *Bristow*, this Court finds that plaintiff was constructively discharged from her position.

B. Sexual Harassment Claim

Plaintiff has brought a claim of sex discrimination under Title VII based on the theory that sexual harassment created a hostile environment in the workplace and also that her employer retaliated against her for not giving into [sic] his sexual demands. Plaintiff asserts the following facts in support of her sexual harassment claim. She states that soon after she started working at DRG, Dr. Hyatt kissed her and said, "I have got to kiss you." Dr. Johnson states that on several occasions from August 1984 through May, 1985, Dr. Hyatt "demanded that she have lunch with him, sit with him in the lunchroom, or visit him in his office to discuss 'global issues.'" She further states that on at least four occasions between July and August, 1984 Dr. Hyatt placed his hands on Dr. Johnson's shoulders and back, which was unwelcome and offensive to her. Dr. Johnson states that on various occasions Dr. Hyatt was unduly critical of her work and complained about her "body language." Dr. Johnson alleges that on April 12, 1985, at the end of an evaluation meeting, Dr. Hyatt embraced her. Plaintiff contends that Dr. Hyatt conditioned Dr. Johnson's continued employment on sexual favors, and because plaintiff did not submit, Dr. Hyatt retaliated against her by giving her poor reviews, failing to accommodate her for her handicaps, and denying her requests for leave.

Dr. Hyatt admits to calling Dr. Johnson "Luv." He also admits that this was a term of "affection" that he used only with women and children.[7/] He further admits to touching her shoulders on occasion, but never kissing or embracing her. He denies asking her to socialize with him. He admits he discussed "body language" with Dr. Johnson but did not intend any sexual connotation.

From the evidence presented at trial, the Court is unable to determine whether harassment that resulted in a "hostile work environment" took place. The Court agrees with plaintiff that "Luv" is a diminutive term, a most inappropriate way for a supervisor to address an employee. Dr. Hyatt admitted that it was a term of "affection" reserved for women and children. He also admits to touching Dr. Johnson's shoulders on occasion. However, such touching may or may not have been a sexual gesture depending on the circumstances. The Court appreciates Dr. Johnson's sincerity in stating that she found such contact offensive. However, she also testified that she never told Dr. Hyatt that she was offended by his conduct. As for the other allegations, the Court honestly cannot determine whether they did or did not take place. Although their testimony was incompatible in some regards, both Dr. Johnson and Dr. Hyatt appeared credible to the Court. Perhaps there is some truth to both sides of the story.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that sexual harassment violates Title VII if it creates a "hostile work environment" or when it takes the form of "*quid pro quo.*" *Id.* at 65-67. Plaintiff proceeds under both theories. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67. Under

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[7/]Dr. Hyatt is apparently of British origin; he indicated at trial that where he comes from the word "luv" is commonly used to address women and children.

the facts clearly established at trial, namely that Dr. Hyatt called plaintiff "Luv" and touched her shoulders on occasion, the Court cannot say that the standard of *Meritor* or "an abusive working environment" is met here. The Court does feel that such conduct may in fact have constituted sexual harassment, but that the conduct was not sufficiently severe or pervasive to violate Title VII.

As for the *quid pro quo* theory, the Court concludes that plaintiff has failed to prove her case. She has not given any particular examples of how Dr. Hyatt conditioned the terms of her employment on sexual favors or socializing.

III. DAMAGES

Having determined that defendant violated the Rehabilitation Act by failing to reasonably accommodate plaintiff, the Court must now assess damages. Plaintiff seeks reinstatement, back pay, front pay and compensatory damages, namely the expenses incurred in her search for a new job.

The Supreme Court has not determined "the extent to which money damages are available under Sec. 504." *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984). However, the Supreme Court did authorize the award of back pay under the Rehabilitation Act as an equitable remedy. *Id.* Although the circuits differ as to whether compensatory damages such as pain and suffering may be recovered, many courts have allowed compensatory damages where there is actual out-of-pocket loss. *See e.g. Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881, 885 (4th Cir. 1982); *Meiner v. State of Mo.*, 673 F.2d 969, 977-79 (8th Cir.), *cert. denied*, 459 U.S. 916 (1982). In *Liller v. Baltimore County*, 51 FEP Cases 1352 (D. Md. 1990), where the plaintiff was injured by a facility not adequately equipped for the handicapped, Judge Hargrove of this Court found that compensatory damages are available under the Rehabilitation Act. This Court believes that

plaintiff is entitled to compensation for her job search costs. However, the accounting provided by plaintiff is rather vague, especially with regard to the phone calls. The Court feels that given this uncertainty, plaintiff must submit further documentation with respect to job search costs.

The Court will direct that plaintiff be reinstated to the same grade level position she previously held at NIH. However, given the history in this case, the Court feels that it would be unproductive to reinstate Dr. Johnson to a position under her previous supervisor. Defendants will be directed to place Dr. Johnson in an appropriate position as soon as possible.

Moreover, plaintiff will be entitled to back pay and front pay up until the date she is reinstated, minus the amount she has earned in mitigation of damages and the amount she has received in worker's compensation and disability benefits. Since leaving DRG, Dr. Johnson earned from various jobs a total of $40,786.69. According to plaintiff's calculations, had she remained at DRG, she would have earned a total of $266,309.08. From this latter sum must be deducted total worker's compensation benefits received from April 22, 1986 to June 9, 1991 of $167,884.00 ($154,884.00 + $13,000.00). From the resulting figure of $98,425.08 must be subtracted what the plaintiff has earned in mitigation of damages, $40,786.69; for a total entitlement of $57,638.39. The Court is aware that defendant attempted to show what the effect would have been if taxes were taken out of this amount. The Court considers this type of computation to be too speculative. Attorneys fees in an amount to be later determined by the Court will also be awarded.

The Court will issue an Order consistent with this Memorandum.

/s/ Herbert F. Murray
Senior United States District Judge

Dated: November 13, 1991

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

SHARON JOHNSON, PH.D. :

V. : CIVIL NO. HM-89-2999

DR. LOUIS W. SULLIVAN :

ORDER

In accordance with the Memorandum issued on this date in the above-captioned case, it is this 13th day of November, 1991, by the United States District Court for the District of Maryland,
ORDERED:

(1) That judgment be, and the same hereby is, Entered in favor of the plaintiff and against the defendant;

(2) That the defendant shall Reinstate the plaintiff to the same grade position she previously held at the National Institute of Health and to an appropriate position as soon as possible;

(3) That the defendant shall tender to the plaintiff back pay in the amount of $57,638.39.

(4) That within thirty (30) days from the date of this Order, the parties shall submit to this Court an assessment of the plaintiff's job search costs and attorney's fees;

(5) That the Clerk of the Court shall Close this case; and

(6) That the Clerk of the Court shall mail a copy of this Order and accompanying Memorandum to the parties.

/s/ Herbert F. Murray
Senior United States District Judge

APPENDIX E

Statutory Provisions Involved

The Rehabilitations Act, 29 U.S.C. § 791, provides:

§ 791. Employment of individuals with disabilities

(a) Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co-chairman; availability of other Committee resources; purpose and functions

There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs[,] the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement

practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which

will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified individuals with disabilities.

(g) Standards used in determining a violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201-12204 and 12210), as such sections relate to employment.

The Rehabilitation Act, 29 U.S.C. § 794, provides:

Nondiscrimination under federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity

conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers; exception

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 122201-12204 and 12210), as such sections relate to employment.

(7)

Supreme Court, U.S.
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No. 93-248

In the Supreme Court of the United States

OCTOBER TERM, 1994

SHARON JOHNSON, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner established a claim of constructive discharge under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 991 F.2d 126. The memorandum opinion of the district court (Pet. App. 15a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. A petition for rehearing was denied on May 17, 1993. Pet. App. 12a-14a. The petition for a writ of certiorari was filed on August 16, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed by the National Institutes of Health (NIH) within the Department of Health and Human Services (HHS) from 1979 until August, 1986, when she resigned. From 1984 on, she was the Executive Secretary of the Pathobiochemistry Study Section in NIH's Division of Research Grants in Bethesda, Maryland. The Study Section is made up of scientists who review applications to NIH for biomedical research grants. As Executive Secretary, petitioner was required to organize and attend meetings of the Study Section, prepare reports of the meetings, and visit grant applicants. In addition, she was required to chair the Study Section meetings and be present for their entirety. See 5 U.S.C. App. 10(e), at 1179; Pet. App. 3a, 16a, 18a, 27a.

During her employment at NIH, petitioner suffered from two health problems. She had a form of narcolepsy that caused her to be chronically sleepy. She also had cardiac arrhythmia, a condition that causes an erratic, rapid heartbeat. The heart condition prevented her from taking the medications normally prescribed for narcolepsy. As a result of her narcolepsy, petitioner had to take naps during the day. On several occasions, she fell asleep during Study Section meetings. Pet. App. 3a, 17a; see also Tr. 4, 269-270.

Petitioner's health problems were made more difficult by commuting problems. After moving to Annapolis, Maryland, in 1982, petitioner had an hour-long drive to Bethesda twice each day. Because of her narcolepsy, petitioner often had to pull off the road during her morning commute for 15-

minute naps, causing her sometimes to arrive at work late. Pet. App. 3a-4a, 17a.

In August, 1985, petitioner wrote to her immediate supervisor, Dr. Asher Hyatt, requesting two accommodations to her handicaps: *first*, that she be given flexible starting and ending times for work; and, *second*, that she be allowed to change her regularly scheduled working hours more frequently than the officially permitted dates of July 1 and December 1, so as to take advantage of seasonal traffic patterns. Pet. App. 4a, 18a. To support her request, petitioner gave Dr. Hyatt a letter from her physician stating that petitioner "need[ed] to have flexible working hour schedule with due regard given to possible late arrival and late departure." *Id.* at 4a. Alternatively, the doctor said that flexible hours would not be necessary "[i]f [petitioner] were given a regular work schedule wherein she could participate in a car pool arrangement [and] * * * would not be responsible for driving to and from work." *Ibid.*

After consulting with his supervisor and NIH's Occupational Medical Services (OMS), Dr. Hyatt sent petitioner a memorandum stating "[t]he only further accommodation I can make is to the hours of a carpool." Pet. App. 4a; see *id.* at 20a-21a. At about the same time, petitioner and other NIH employees were told that under a new "flextime" policy, they could arrive up to 15 minutes after their scheduled starting time, if they made up the time at the end of the day. *Id.* at 4a-5a. In addition, petitioner was permitted to change her work schedule four times a year, even though other employees could change their schedules only twice a year. *Id.* at 5a, 11a.

Petitioner joined a carpool, but it did not completely solve her problems. On the days that she was responsible for driving, her commute took longer than before. In addition, she could not use the carpool every day. Petitioner did not, however, convey her dissatisfaction to Dr. Hyatt. Pet. App. 5a, 20a-22a.

In February, 1986, petitioner asked Dr. Hyatt to allow her to stay at a hotel in Bethesda for two nights at government expense during a three-day Study Section meeting at the hotel. Dr. Hyatt denied the request, as it was contrary to NIH policy. Pet. App. 5a.

On April 7, 1986, petitioner requested five weeks of leave without pay, to begin two days later, on April 9. Accompanying that request was a letter from her clinical psychologist stating that petitioner needed the time off because of physical and psychological exhaustion, which the psychologist attributed to the stress of her job and her commute. The request was approved by Dr. Friedman, petitioner's second-level (and Dr. Hyatt's immediate) supervisor, on the condition that petitioner first finish certain work left over from the most recent Study Section meeting and some other work required before the next round of meetings. Petitioner began an extended period of leave without pay in late April, 1986. Pet. App. 5a-6a, 23a-24a.

Four days after requesting extended leave without pay, petitioner requested 52 hours of advance sick leave (*i.e.*, sick leave that she had not yet accumulated), 29 hours of which she had already taken before making the request. Dr. Hyatt authorized the leave she had already taken but told her that in the future she would have to comply with NIH rules by requesting the advance sick leave in writing before

she took it. When, shortly thereafter, petitioner again took advance sick leave without first requesting it in writing, the time was subtracted from her annual leave. Pet. App. 5a-6a, 23a.

In May, 1986, Dr. Thomas Goldman, a psychiatrist, wrote a letter on petitioner's behalf to the executive director of the Study Section, James Pike. Goldman said in his letter that petitioner did "not appe[a]r to have the resources to adapt effectively to the stress level in her work environment." Pet. App. 6a. He also said that he found it "doubtful that a truly reasonable accommodation can be provided her." *Id.* at 7a. He said that "the best alternative from the medical standpoint would be retirement." *Ibid.* Later in May, 1986, petitioner asked for, and was granted, an extension of her leave without pay. *Ibid.*

On June 4, 1986, petitioner applied for a disability retirement. 991 F.2d at 130.[1] On June 5, Dr. Hyatt wrote an evaluation of petitioner, backdated to April 1, 1986, describing her performance as unsatisfactory. *Ibid.* Dr. Hyatt admitted at trial that the evaluation did not accurately reflect his views; he wrote it in the belief that petitioner's attorney had approved the preparation of a negative evaluation for the limited purpose of supporting petitioner's application for disability retirement. See *ibid.*; Tr. 1131-1132, 1138, 1142, 1147 (testimony of Hyatt); see also Tr. 1222, 1242-1245 (testimony of Pike). In preparing the evaluation, Dr. Hyatt cut out petitioner's signature from a prior evaluation form, taped it on the new

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[1] We cite the reported version of the court of appeals' opinion at this point because petitioner's appendix omits (Pet. App. 7a) the paragraph of the opinion to which this portion of our statement relates.

form, and photocopied the page. The falsified signature indicated that petitioner had reviewed the expectations formulated for her position. (It in no way suggested that she had reviewed the adverse appraisal.)[2] The evaluation was first shown to petitioner during a psychiatric examination performed by CMS at NIH's request while she was on leave. Pet. App. 7a, 26a.

In early August, 1986, petitioner met with an NIH official to discuss possible reassignment. The official offered her a position at GS-13, one grade lower than her GS-14 position as Executive Secretary, which she declined.[3] On August 20, 1986, petitioner resigned. She was later awarded disability retirement benefits. Pet. App. 7a, 26a-28a.

2. Petitioner filed this action against the Secretary of HHS in the United States District Court for the District of Maryland, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* After a bench trial, the district court rejected her Title VII claim but entered judgment in her favor on the Rehabilitation Act claim. Pet. App. 7a-8a.

In upholding the Rehabilitation Act claim, the district court first held that NIH had not provided "reasonable accommodation" to petitioner's handicaps.[4]

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[2] The government acknowledged on appeal that Hyatt's action was "wrong and a serious mistake." 991 F.2d at 130.

[3] The parties disputed whether she was offered the same salary for the GS-13 position as she was then receiving for her GS-14 position. Pet. App. 7a.

[4] The district court had previously held in pretrial rulings that petitioner was entitled to reasonable accommodation un-

The court found that, although petitioner had 15 minutes of flexibility in her arrival time for work, she had requested 30 minutes, and that it would not have been unduly burdensome for NIH to have given her 30 minutes' leeway. Pet. App. 31a-35a. The court further found that petitioner "was not provided with reasonable accommodation with regard to her requests for leave to attend to medical problems." *Id.* at 35a. Finally, the court found that "there was some degree of coercion in [NIH's] 'request' that [petitioner] be evaluated at OMS." *Id.* at 36a. The court expressly declined, however, to hold that the evaluation was illegal, as petitioner had contended. *Ibid.*

The district court further held that petitioner had been constructively discharged. The court began by observing that under Fourth Circuit precedent "[a] constructive discharge occurs when 'an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job.'" Pet. App. 36a, quoting *Bristow* v. *Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986), quoting *Holsey* v. *Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985). Applying that precedent, the court first determined that petitioner's working conditions were intolerable, primarily because "[h]er employers failed to provide her with the accommodation she required and did not seriously consider her for any alternative positions." Pet. App. 37a. In addition, the court noted that "[a]fter filing for disability, [petitioner] was pressured to submit to psychiatric

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der the Rehabilitation Act, because she was an "individual with handicaps" who was "otherwise qualified" for her job within the meaning of the Act. Pet. App. 30a.

evaluations, at which she found out that her supervisor had written an extremely negative appraisal of her." *Ibid.* Under those circumstances, the court believed, "a reasonable person * * * may well have felt compelled to resign." *Ibid.* The court next determined that the evidence supported the inference that NIH intended to force her to quit. The court reasoned: "[petitioner's] supervisors had ample notice over several months that she needed some changes in her working conditions; however, they failed to act to help her." *Id.* at 38a.

The district court ordered that petitioner be placed in an "appropriate position" at her previous grade-level and awarded her approximately $57,000 in damages. Pet. App. 41a.

3. On appeal, the government challenged only the district court's holding that petitioner had been constructively discharged. The Fourth Circuit reversed. Pet. App. 1a-11a.

The Fourth Circuit held that "the district court erred as a matter of law in grounding its finding of constructive discharge upon the premise that NIH failed to afford [petitioner] reasonable accommodation." Pet. App. 10a. The Fourth Circuit concluded that, in order to prove a constructive discharge, the plaintiff in a Rehabilitation Act case must do more than show that the employer's accommodation to the plaintiff's handicaps "falls short of satisfying the requirements of the * * * Act." *Ibid.* Instead, in a "case of partial or imperfect accommodation," the plaintiff "must present some evidence that the employer intentionally sought to drive her from her position." *Id.* at 10a, 11a. Such an intention, the court said, "can be demonstrated by actual evidence * * * or circumstantial evidence." *Id.* at 8a. The court

specified that circumstantial evidence of intent may include "a complete failure to accommodate [an employee's handicaps], in the face of repeated requests." *Id.* at 11a.

The Fourth Circuit held that the evidence was insufficient to show that NIH acted with the intention to drive petitioner from her position. The court observed that "NIH did not ignore [petitioner's] requests [for accommodation]—NIH responded, but frequently in ways that she found unsatisfactory." Pet. App. 10a. The court found (*ibid.*):

> Rather than the thirty-minutes flexibility in her starting time that [petitioner] requested, NIH gave her fifteen. She was authorized to join a carpool, but without the regularized hours that she wanted. NIH granted her initial request for Leave Without Pay, albeit under the condition that she complete certain necessary work before departure. NIH also offered [petitioner] a different position, but [petitioner] refused it because it was at a lower grade. In other instances, NIH complied fully with [petitioner's] requests, permitting her to change duty hours four times a year instead of twice like other employees, and later granting her extended Leave Without Pay.

The court further found that "[t]he evaluation falsified by Hyatt, while plainly inexcusable, fails to demonstrate an intent by NIH to force [petitioner] from her position because the evaluation was prepared only after [petitioner] herself requested disability retirement." *Id.* at 11a. The court concluded that petitioner's evidence "may well demonstrate a lack of flexibility or magnanimity on the part of her supervisors, but what it does not demonstrate is a deliberate intent to force [petitioner] from her job." *Ibid.*

ARGUMENT

Petitioner challenges (Pet. 4-11) the Fourth Circuit's rejection of her claim of constructive discharge under the Rehabilitation Act. We believe that the Fourth Circuit's decision would be erroneous if read as (1) holding that, to establish such a claim, a plaintiff must prove that her employer intended to force her to quit; or (2) suggesting that the standard for proving a constructive discharge under the Rehabilitation Act should be more stringent than the standard applicable under other employment discrimination statutes. However, there is a narrower, valid ground for upholding the Fourth Circuit's judgment,[5] and, in

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[5] In the court of appeals, the government primarily argued that the district court erred by holding that NIH's failure to make a reasonable accommodation to petitioner's handicap, standing alone, amounted to a constructive discharge. Gov't C.A. Br. 19-20. We continue to believe that an employer's failure to make a reasonable accommodation to an employee's handicap (followed by the employee's resignation) does not automatically compel the conclusion in every case that the employee has been constructively discharged. We also continue to believe that the district court erred in relying upon such a per se rule. The Fourth Circuit's decision, however, could be read to go farther than simply rejecting the per se rule upon which the district court relied. Indeed, the government argued in the Fourth Circuit that, under that court's precedent, constructive discharges occur only when there has been a deliberate attempt to force an employee to quit. Gov't C.A. Br. 26. The Fourth Circuit's decision and the position that the government took below on the issue of intent have been the subject of broad consultation within the Executive Branch, especially in light of recent decisions rejecting an intent standard in other circuits, discussed pp. 14-17 *infra*. As a result of this consultation, the government no longer takes the position that a finding of intent to force an employee to leave

addition, we believe further review is unwarranted for the reasons set forth below.

1. The Fourth Circuit's decision does not conflict with any decision of this Court or that of any other court of appeals regarding the proper interpretation of the Rehabilitation Act. Indeed, petitioner does not cite (and we are not aware of) any other decision in which a court of appeals has even addressed the standard for proving a claim of constructive discharge under that Act. The absence of a conflict among the circuits (and the absence of any other appellate case law) on the question presented here weigh heavily against further review.

Petitioner asserts that "[t]here is a sharp split among the circuits as to the proper standard for establishing a constructive discharge in employment discrimination cases." Pet. 4. In support of that assertion, petitioner cites decisions involving claims of constructive discharge under statutes other than the Rehabilitation Act. See Pet. 4-9 & nn.2-3, 5. The overwhelming majority of those decisions arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[6] A Rehabilitation Act case is not an

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is required in order to support a conclusion of constructive discharge.

[6] Of the 17 decisions cited by petitioner in support of her claim of a conflict, 14 arise under Title VII, one arises under the Age Discrimination in Employment Act, and two arise under 42 U.S.C. 1983. See Pet. 4 n.2, citing *Hopkins* v. *Price Waterhouse*, 825 F.2d 458, 472 (D.C. Cir. 1987) (Title VII), rev'd on other grounds, 490 U.S. 228 (1989); *Watson* v. *Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (Title VII); *Derr* v. *Gulf Oil Corp.*, 796 F.2d 340, 343-344 (10th Cir. 1986) (Title VII); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3d Cir. 1984) (Title VII); *Pittman* v. *Hatties-*

appropriate context in which to resolve a conflict that has arisen under *other* employment discrimination laws, primarily Title VII.

Moreover, this Rehabilitation Act case would be a particularly inappropriate vehicle for resolving the asserted conflict. In its decision, the Fourth Circuit expressly declined to follow case law involving other employment discrimination statutes. The court determined that "[t]he traditional standard of constructive discharge," which "has evolved in cases of age, sex and race discrimination," does "not neatly translate to the context of the Rehabilitation Act." Pet. App. 8a-9a. In light of that determination, if this Court granted further review in this case to resolve the

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burg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. 1981) (Title VII); *Aviles-Martinez* v. *Monroig*, 963 F.2d 2, 6 (1st Cir. 1992) (Section 1983); *Greenberg* v. *Hilton Int'l Co.*, 870 F.2d 926, 932, 935-936 (2d Cir. 1989) (Title VII); *Buckley* v. *Hospital Corp. of America*, 758 F.2d 1525 (11th Cir. 1985) (age discrimination); *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 423-424 (7th Cir. 1989) (Title VII); *Daniels* v. *Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991) (Title VII); Pet. 5 n.3, citing *Holsey* v. *Armour & Co.*, 743 F.2d 199, 208-209 (4th Cir. 1984) (Title VII); *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (Title VII); Pet. 6, citing *Yates* v. *Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (Title VII), and *Henry* v. *Lennox Indus., Inc.*, 768 F.2d 746, 752 (6th Cir. 1985) (Title VII); Pet. 8, citing *Nolan* v. *Cleland*, 686 F.2d 806, 812-814 (9th Cir. 1982) (Title VII), and *Bourque* v. *Powell Electrical Mfg. Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980) (Title VII); Pet. 9 n.5, citing *Smith* v. *Cleburne County Hosp.*, 870 F.2d 1375, 1380-1381 (8th Cir.) (Section 1983), cert. denied, 493 U.S. 847 (1989). See generally *Simpson* v. *Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453, 461-463 & nn.8-9 (D.C. Cir. 1988) (citing and discussing constructive discharge claims under Title VII and other employment discrimination statutes).

asserted conflict, the Court would have to address the question whether the standard for proving constructive discharge in cases arising under Title VII and other employment discrimination statutes should apply in cases arising under the Rehabilitation Act.[7] While we believe that the standard for proving a constructive discharge under the Rehabilitation Act should not differ from the standard applicable under other employment discrimination statutes, this Court need not address that novel question, on which there is no conflict, without the benefit of any lower court decisions on the question aside from the decision below.[8]

2. Further review is also unwarranted because the asserted conflict among the lower courts on the standard for proving a claim of constructive discharge under the employment discrimination laws has stead-

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[7] As noted above, the vast majority of decisions concerning the standard for proving a constructive discharge arise under Title VII.

[8] Cf. *Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1079 n.5 (3d Cir. 1992) (stating, without elaboration, that "the doctrine of constructive discharge is the same in all employee discrimination claims such as those under the [Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*]"), cited at Pet. 4 n.1.

Petitioner cites (Pet. 6) the recently enacted Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (Supp. IV 1992), as an example of a statute under which a claim of constructive discharge may be made. The enactment of that statute increases the significance of the question whether a uniform standard of proving a constructive discharge should apply under the federal employment discrimination laws, and also increases the likelihood that the lower federal courts will have opportunities to address that question before it is necessary for this Court to do so.

ily abated and may well abate entirely without the need for review by this Court.

a. The Fourth Circuit is now alone among the circuits in appearing to require a plaintiff claiming constructive discharge to prove that her employer intended to force her to quit. That was not always the case. On the contrary, three other circuits initially appeared to require proof of intent but rejected that requirement in later decisions.

As petitioners point out (Pet. 9 n.5), "the Eighth Circuit concur[red] in the Fourth Circuit's 'deliberate intent' requirement" in *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981). The Eighth Circuit there stated that a constructive discharge encompasses two requirements: (1) that "a reasonable person [in the employee's position] would find conditions intolerable"; and (2) that "the employer's actions must have been taken with the intention of forcing the employee to quit." *Ibid.* The court held that the plaintiff had failed to meet the second requirement, because the evidence "rebut[ted] any inference that [the employer's] handling of [the plaintiff] was done with the intention of forcing him to resign." *Ibid.*

In *Hukkanen* v. *International Union of Operating Engineers Local No. 101*, 3 F.3d 281 (1993), however, the Eighth Circuit took a different view. The Eighth Circuit in that case said, "Our language in *Bunny Bread* does not mean constructive discharge plaintiffs must prove their employers consciously meant to force them to quit." *Hukkanen*, 3 F.3d at 284. The court explained that "[w]hen an employer denies a conscious effort to force an employee to resign * * *, the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions." *Ibid.*, citing *Derr* v. *Gulf Oil Corp.*, 796

F.2d 340, 344 (10th Cir. 1986), and *Clark* v. *Marsh*, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981). The court accordingly held that "if [the plaintiff's] resignation was a reasonably foreseeable consequence of [her employer's sexual] harassment, [the employer's] 'actions [were necessarily] taken with the intention of forcing [the plaintiff] to quit.'" *Hukkanen*, 3 F.3d at 285, quoting *Bunny Bread*, 646 F.2d at 1256.

In construing its precedent not to require proof of intent, the Eighth Circuit followed a path already traveled by the Tenth Circuit and the D.C. Circuit. In *Muller* v. *United States Steel Corp.*, 509 F.2d 923, cert. denied, 423 U.S. 825 (1975), the Tenth Circuit reversed the district court's ruling that the plaintiff in a Title VII case had been constructively discharged, finding that the employer's actions "were not designed to coerce [the plaintiff's] resignation." 509 F.2d at 929. The court thus held that "the proof of constructive discharge fail[ed]" as a result of the "dearth of evidence to show a deliberate effort [by the employer] to make things difficult for the employee so as to bring about his separation." *Ibid.*

The Tenth Circuit subsequently "clarifi[ed] * * * the standard for finding a constructive discharge" in *Derr*, 796 F.2d at 344, cited in *Hukkanen*, 3 F.3d at 284. The court in *Derr* recognized that "some language in *Muller* * * * suggests that our focus may once have been on the explicit subjective intent of the employer to force the employee to leave." *Derr*, 796 F.2d at 344. The court determined, however, that the focus should be "on an objective standard." *Ibid.* The court specified that the proper inquiry "is simply whether the employer by its illegal discriminatory acts has made working conditions so difficult that a

reasonable person in the employee's position would feel compelled to resign." *Ibid.*

The Tenth Circuit in *Derr* explained that its "shift in emphasis" from a subjective, employer-focused inquiry to an objective, employee-focused one "is consistent with the District of Columbia Circuit's observation that '[t]o the extent that [the employer] denies a conscious design to force [the employee] to resign, we note that an employer's subjective intent is irrelevant; [*the employer*] *must be held to have intended those consequences it could reasonably have foreseen.*' " 796 F.2d at 344, quoting, with emphasis, *Clark* v. *Marsh*, 665 F.2d at 1175 n.8. That is the same observation upon which the Eighth Circuit relied in announcing a similar "shift in emphasis" in *Hukkanen*, 3 F.3d at 284.

Notwithstanding the observation in *Clark* upon which the Eighth and Tenth Circuits relied, other language in *Clark* suggested that proof of intent was required. See 665 F.2d at 1173 (quoting with approval language from *Muller* requiring proof of intent and stating that "a finding of constructive discharge depends on [whether the employer] deliberately made * * * working conditions intolerable and drove [the employee] into an involuntary quit") (internal quotation marks omitted; bracketed material supplied by court in *Clark*). The D.C. Circuit recognized as much in later decisions. See *Simpson* v. *Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453, 462 (D.C. Cir. 1988) ("selected passages from *Clark* * * * suggest that employer intention is relevant to the constructive discharge doctrine this circuit employs under Title VII"); *Hopkins* v. *Price Waterhouse*, 825 F.2d 458, 472 (D.C. Cir. 1987) (district court's "literal interpretation" of

language in *Clark* that, "taken at face value, * * * sets forth a stringent standard," was "misplaced" in light of later decisions that "have rejected the notion that the employer must have the specific intent of forcing the employee to quit"). Accordingly, the D.C. Circuit in later decisions has "expressly rejected a motivation test" in favor of an inquiry into "[w]hether conditions are so intolerable that a reasonable person would feel compelled to resign." *Simpson*, 842 F.2d at 462-463; see *Hopkins*, 825 F.2d at 472.[9]

b. In light of the evolution of the law of constructive discharge in the Eighth, Tenth, and D.C. Circuits, it is by no means certain that the Fourth Circuit will apply a stringent intent requirement in future employment discrimination cases.

The Fourth Circuit has looked to the law of those other three circuits in prior cases involving constructive discharge. In the decision below, for example, the Fourth Circuit drew support for an intent requirement from the Eighth Circuit's decision in *Bunny Bread* and its own prior decisions in *EEOC* v. *Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992), and *Bristow* v. *Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985). Pet. App. 8a. *Clay Printing* and *Bristow*, in turn, also cited *Bunny Bread* in support of an intent requirement. *Clay Printing*, 955 F.2d at 944; *Bristow*, 770 F.2d at 1255. *Bristow* relied (770 F.2d at 1255), in addition, on the Tenth Circuit's decision

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[9] Cf. *Dashnaw* v. *Pena*, 12 F.3d 1112, 1115 (D.C. Cir. 1994) (mere fact of intentional discrimination does not suffice to prove constructive discharge in the absence of "aggravating factors"), petition for cert. pending, No. 93-2073 (filed June 22, 1994).

in *Muller* and the D.C. Circuit's decision in *Clark*. As discussed above, however, the circuits that decided *Bunny Bread*, *Muller*, and *Clark* have all construed those decisions not to require proof of intent. It is difficult to believe that the Fourth Circuit will not take cognizance of that fact and, having done so, either clarify that it is in accord with the other circuits or acknowledge the conflict. If it takes the latter course, review by this Court might well be appropriate. In view of the trend in other circuits, however, further review at this time would be premature.[10]

3. Finally, this case is also a poor factual vehicle for further review of the question presented by the

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[10] The rejection of an intent requirement in other circuits is not the only reason for believing that the Fourth Circuit will resolve the asserted conflict itself. As petitioner observes, insofar as the decision below appears to impose a stringent intent requirement, it "departs significantly from the standard previously established by * * * the Fourth Circuit." Pet. 10. In two prior decisions, the Fourth Circuit has stated that an employer's intent to force an employee to quit "may be inferred through * * * a failure to act in the face of known intolerable conditions." *Bristow*, 770 F.2d at 1255; accord *Holsey* v. *Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985). That statement closely resembles statements by circuits that petitioner claims are in conflict with the Fourth Circuit. See, *e.g.*, *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d at 888 (Third Circuit decision stating that, to prove constructive discharge, "[t]he court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign"), cited in Pet. 4 n.2; accord *Hukkanen*, 3 F.3d at 284-285; *Schafer* v. *Board of Pub. Educ.*, 903 F.2d 243, 249 (3d Cir. 1990); but cf. *Paroline* v. *Unisys Corp.*, 879 F.2d 100, 113-114 (1989) (Wilkinson, J., dissenting), dissenting opinion adopted in relevant part by en banc court, 900 F.2d 27, 28 (4th Cir. 1990).

petition. The question, as petitioner frames it, is "whether a showing of deliberate intent [on the part of an employer to force an employee to quit] is a mandatory element of a constructive discharge claim." Pet. 8. Petitioner argues that no such showing should be required, because "an employer who creates intolerable working conditions which it fails to correct demonstrates that it intends to force the resignation of employees afflicted by the intolerable conditions." *Ibid.* Thus, adequate consideration of the question framed by petitioner depends heavily on the existence of intolerable working conditions.

Although the government did not challenge on appeal the district court's holding that petitioner's working conditions were intolerable, the evidence supporting that holding was weak. That weakness, moreover, appears to have influenced the Fourth Circuit's analysis of the intent issue, as illustrated by the passage quoted in the margin.[11] Although we did not contend

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[11] Pet. App. 10a-11a:

> [W]e believe the district court erred as a matter of law in grounding its finding of a constructive discharge upon the premise that NIH failed to afford [petitioner] reasonable accommodation. The evidence here is insufficient to show a deliberate intent to discharge an employee when there has been an attempt to accommodate that same employee, even though the accommodation falls short of satisfying the requirements of the Rehabilitation Act. The plaintiff must present some evidence that the employer intentionally sought to drive her from her position.
>
> In this case, [petitioner] failed to meet this burden. NIH did not ignore [petitioner's] requests—NIH responded, but frequently in ways that she found unsatisfactory. Rather than the thirty-minutes flexibility in her starting time that [petitioner] requested, NIH gave her fifteen. She was authorized to join a carpool, but without

in the court of appeals that the district court committed clear error in finding that petitioner's working conditions were intolerable, the existence of intolerable working conditions is nevertheless too dubious in this case to permit adequate consideration of the question whether the existence of such conditions amounts to a constructive discharge in the absence of an intent to have the employee leave.

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the regularized hours that she wanted. NIH granted her initial request for Leave Without Pay, albeit under the condition that she complete certain necessary work before departure. NIH also offered [petitioner] a different position, but [petitioner] refused it because it was at a lower grade. In other instances, NIH complied fully with [petitioner's] requests, permitting her to change duty hours four times a year instead of twice like other employees, and later granting her extended Leave Without Pay. NIH could have done more, and should have done more to conform to the requirements of the Rehabilitation Act, but it did not simply turn its back on [petitioner's] needs. Finally, once [petitioner] requested disability retirement, a solution urged by her own psychiatrist, personnel at NIH tried to help her obtain approval for her application. The evaluation falsified by Hyatt, while plainly inexcusable, fails to demonstrate an intent by NIH to force [petitioner] from her position because the evaluation was prepared only after [petitioner] herself requested disability retirement. The evidence put forth by [petitioner] may well demonstrate a lack of flexibility or magnanimity on the part of her supervisors, but what it does not demonstrate is a deliberate intent to force [petitioner] from her job. NIH tried, but failed, to accommodate [petitoner's] handicaps.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-248

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHARON JOHNSON,
Petitioner,

v.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. In its opposition to the Petition, the government effectively concedes that the decision below was erroneous. Opp. 10 n.5. In light of this concession, this Court should grant the Petition, vacate the decision below, and remand the case for further proceedings. *See Mariscal* v. *United States*,

449 U.S. 405 (1981); *DeMarco* v. *United States*, 415 U.S. 449 (1974).

Before the Fourth Circuit, the government argued that "[i]n order to be constructively discharged, an employee must have resigned in direct response to an employer who is deliberately pressuring her to leave her job." Brief of Appellant/Cross Appellee, at 17. In other words, "there must be proof of the employer's specific intent to force the employee to leave" in order to establish a constructive discharge. Brief of Appellant/Cross Appellee, at 19.

The Fourth Circuit's holding on the liability issue rests squarely on the deliberate intent requirement proposed by the government: "[W]e find no evidence that NIH intended to force Johnson to resign, and accordingly we reverse the judgment of the district court." Pet. App. 2a. Under the Fourth Circuit's holding, in order to establish a constructive discharge, an employee must show not only the existence of intolerable working conditions, but also the existence of a deliberate intent on the part of the employer to force the employee to quit.[1/] Pet. App. 10a-11a.

[1/] Contrary to the suggestion of the government, Opp. 10 n.5, Petitioner did not argue below, nor did the district court hold, that an employee may establish a constructive discharge based solely on being denied reasonable accommodation of a known disability. *See* Pet. 10 n.8; Pet. App. 37a-38a. Instead, Petitioner argued below, and the district court held, that a claim of constructive discharge may follow from an employer's failure to provide reasonable accomodation when such a failure results in intolerable working conditions. Pet. 8, 10 & 10 n.8. The trial court so held, and the government did not appeal below the district court's findings that NIH failed to offer reasonable accommodation and that this failure created intolerable working conditions.

The government has now completely abandoned its prior position as to the need for evidence of specific intent, which also formed the essential underpinning of the Fourth Circuit's decision. The government explains that "[t]he Fourth Circuit's decision and the position that the government took below on the issue of intent have been the subject of broad consultation within the Executive Branch." Opp. 10 n.5. "As a result of this consultation, the government no longer takes the position that a finding of intent to force an employee to leave is required in order to support a conclusion of constructive discharge." *Id.*[2/] In light of these circumstances, the Court should construe the government's opposition as a confession of error.

In similar circumstances, this Court has treated a decision by the Solicitor General not to defend the position that the government argued below as a tacit confession of error, granted the petition for certiorari, and entered a per curiam judgment in favor of the petitioner. *See DeMarco* v. *United States*, 415 U.S. 449, 449-50 (1974); *see also Mariscal* v. *United States*, 449 U.S. 405-06 (1981) (granting petition for certiorari and vacating decision below based on "concession" by the Solicitor General). In *DeMarco*, the Solicitor General "filed a response [to a petition for certiorari] which, though entitled 'Memorandum in Opposition,' incorporates in a footnote a backhanded invitation to the Court to follow the course which it has now taken [i.e., granting the petition and summarily reversing the decision of the Court of Appeals]." *Id.* at 451 (Rehnquist, J., dissenting). There is no

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[2/] The government also states that "the Fourth Circuit's decision would be erroneous if read as . . . holding that, to establish [a constructive discharge] claim, a plaintiff must prove that her employer intended to force her to quit." Opp. 10. That is, however, exactly what the Fourth Circuit held (*see* Pet. App. 2a, 10a-11a), and thus the government is expressly repudiating the holding below.

material distinction between *DeMarco* and this case; the Court should therefore construe the government's opposition as a confession of error.

The government is plainly unwilling to defend the Fourth Circuit's holding. Its opposition does not present any alternative legal basis for affirming the Fourth Circuit's decision. In these circumstances, the most appropriate course of action is for the Court to reverse summarily the decision below and remand the case to the Fourth Circuit for further proceedings in light of the government's change of position. *See, e.g., DeMarco*, 415 U.S. at 450.

2. As set forth in the Petition, there currently exists a split among the Circuits on the correct standard for establishing a constructive discharge. Pet. 4-8. The government concedes that this split exists. It also acknowledges that the legal question presented in this case is such an important one that it has "been the subject of broad consultation within the Executive Branch." Opp. 10 & 10 n.5. Nevertheless, the government offers three reasons for denying the Petition. As explained below, none of these reasons has merit.

a. The government urges the Court to deny the Petition because this case involves the Rehabilitation Act, whereas the conflicting constructive discharge decisions from other Circuits involve Title VII or other employment discrimination statutes. Opp. 11-13. But the government expressly concedes, despite the Fourth Circuit's suggestion to the contrary, Pet. App. 9a, that the standard for constructive discharge should not vary depending on the employment

statute that is at issue,[3/] Opp. 10, 13, and it is clear that the same standard for establishing the existence of a constructive discharge applies under the Rehabilitation Act as under other employment statutes. *See Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1079 n.5 (3rd Cir. 1992); *see also Goss* v. *Exxon* Office Sys. Co., 747 F.2d 885, 887 (3rd Cir. 1984) (describing how the constructive discharge doctrine originated in federal labor law and listing cases that apply the constructive discharge doctrine across various civil rights statutes). The fact that the present case arises under the Rehabilitation Act rather than Title VII or some other employment discrimination statute does not affect the basic legal question, which is whether a plaintiff in proving a constructive discharge must establish that the employer had the deliberate intent of forcing the employee to resign.[4/]

b. The government also argues that, to the extent the Fourth Circuit has applied an incorrect standard for proving a constructive discharge, the problem will be self-correcting "and may well abate without the need for review by this Court." Opp. 13-14. In support of this position, the government cites the Eighth Circuit's recent decision in *Hukkanen* v. *International Union of Operating Engineers Local No. 101*, 3 F.3d 281 (8th Cir. 1993). Opp. 14-15. To

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[3/] Indeed, the government itself cites cases arising under Title VII to support some of its arguments, including its argument that the Circuits will ultimately resolve the proper standard for establishing a constructive discharge. *See* Opp. 13-17.

[4/] Because the Fourth Circuit did not find any of the district court's factual determinations to be "clearly erroneous," one must conclude that its holding rests on its interpretation of the law, rather than on the specific facts of the case. *See generally Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-74 (1985). Thus, the Fourth Circuit's holding is not limited to the facts of the case.

be sure, subsequent to the filing of the Petition the Eighth Circuit has made clear that a plaintiff in that Circuit can establish a constructive discharge without showing that the employer harbored a conscious intention to force a resignation, calling an argument for such a requirement a "bizarre contention." *Hukkanen*, 3 F.3d at 284-85. Yet, this "bizarre contention" is now the law of the Fourth Circuit. Pet. App. 2a, 10a-11a. There is no basis for assuming that the Fourth Circuit will abandon its holding in this case or will soon, if ever, adopt a position more in conformity with the position now espoused by the government and by certain other circuits.[5/]

Contrary to the government's assertion, *Hukkanen* and cases like it demonstrate the level of confusion that presently exists in the circuits. There is a strong need for this Court to provide the Circuits with clear guidance on the standards for establishing a constructive discharge.

c. Finally, the government argues that "this case is a poor factual vehicle" for review of the constructive discharge doctrine because there was supposedly only "weak" evidence supporting the district court's finding of intolerable working conditions. Opp. 18-20. But the government did not appeal the district court's finding of intolerable working conditions (which would have required it to show that the finding was clearly erroneous), and it is clearly too late for it now to challenge that finding. At this stage, the Court is required to assume that the district court's finding that Dr. Johnson was

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[5/] Moreover, contrary to the Eighth Circuit's decision which was reached by a panel, the Fourth Circuit adopted the requirement that intent be shown to establish a constructive discharge claim after an en banc determination. *See Paroline* v. *Unisys Corp.*, 900 F.2d 27, 28 (4th Cir. 1990) (en banc); *see also Paroline* v. *Unisys Corp.*, 879 F.2d 100, 113-14 (4th Cir. 1989) (Wilkinson, J., dissenting) (adopted by en banc court).

subjected to intolerable working conditions was adequately supported in the record. *See Maine* v. *Taylor*, 477 U.S. 131, 145 (1986); *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-74 (1985); *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 283-84 (1978); *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976).

CONCLUSION

For the foregoing reasons, the Petition should be granted, the decision below should be summarily reversed, and the case remanded for further proceedings.

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